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NOTES OF INDIAN CASES.

Bhupendra Kumar Chakravarti *v.* **Purna Chandra Bose**: I. L. R. 43 C. 650.

Mohan Lal Nagji *v.* **Bai Kashi**: I. L. R. 40 B. 477.

The provisions of the Court Fees Act allowing a plaintiff to put his own valuation on certain classes of suits have given rise to several questions on which judicial opinion is markedly divided. One is as to the power of the court to check the plaintiff's valuation. Another relates to the jurisdiction of the court to pass a decree in such cases for an amount exceeding the limits of its pecuniary jurisdiction as prescribed by law for purposes of 'institution'. A further question, closely connected with the previous one, is as to the right or forum of appeal in such cases, *viz*, whether that is to be decided with reference to the valuation in the plaint, or the limits of jurisdiction of the court in which the suit was instituted or the amount at which the plaintiff's claim is fixed as a result of the investigation in the suit. The Calcutta case noted above (decided in 1910, though reported only in 1916) arose out of a claim for mesne profits; and the learned judges there lay down two propositions (i) that as regards claims which have accrued at the date of suit and in respect of which the plaintiff is bound to state his valuation in the plaint, he must, by choosing a particular court, be deemed to have limited his claim to the maximum amount for which that court can entertain a suit, (ii) that as regards claims accruing after suit, though awardable by the decree therein, *e. g.* a claim for future mesne profits, the plaintiff should not be held to have waived or lost his right to claim an amount in excess of the limits of the court's jurisdiction but that in such cases the court should return the plaint, *in respect of that part of the suit,* for presentation to the proper court.

In the Bombay case (noted at the top) the suit had been brought for a declaration and an injunction and the question

arose with reference to the right of the plaintiff to appeal to the Privy council, on the ground that the subject-matter of the suit was worth more than Rs. 10,000, though for purposes of Court Fees and Jurisdiction he had valued the suit at Rs. 135. The learned Judges base their decision on the second paragraph of S. 110, C.P.C., *i.e*, on the ground that the case *indirectly* affects property of the value of Rs. 10,000 and to this we can see no exception. But the earlier decision in *Hirjibhai's case* [1], which they distinguish as one falling under the first clause of S. 110, substantially followed the Calcutta view and the learned Judges who decided the later case seem also prepared to adopt that view.

The Allahabad and Madras High Courts take a different view though even as between them, there are differences of opinion on certain points of detail. The considerations properly applicable to the decision of these questions and the flaws in the reasoning on which the conclusions in the Calcutta case are rested and the anomalies to which they must lead are clearly pointed out in the referring order in A. S. 117 of 1915; and so far as this Presidency is concerned, the opinion of the Full Bench in that case which accepts the view of the referring judges, settles the law for the time being.

Chhita Bhula *v.* Bai Jamni: I. L. R. 40 B. 483.

We are not satisfied that the question raised in this case has received sufficient consideration. The general principle that a mortgagee in possession cannot take advantage of a public sale brought about by his own default is of course well settled; but it seems by no means clear that the mortgagee is, by virtue of S. 76 of the Transfer of Property Act or of any other provision of law, under a legal obligation to repay *takkavi* advances taken by the mortgagor, prior to the date of the mortgage. It is to be regretted that the learned Judges should have thought that the point was one of 'fact' as to which they, as a court of second appeal, had to accept the finding of the lower court. The expression 'charges of a public nature' in S. 76 (c) is no doubt very wide, but it is significant that the obligation enacted is to repay them 'out of the income'. It has also to be noted that the charges referred to are those accruing due *in respect* of the land, *during the possession* of

1. (1913) 15 Bom. L. R. 1021.

the mortgagee. These make it clear that the section has reference to recurring liabilities in the nature of taxes, and cannot be held to cover anything in the nature of a repayment of capital received by the mortgagor. A takkavi advance cannot properly be said to accrue due 'in respect of a particular land,' though the statute makes it *recoverable as if* it were an arrear of land revenue due in respect of the land "for the benefit of which the loan has been granted. Nor, does it seem to us that the provision for repayment of the loan by instalments, can suffice to make it a charge accruing due 'during' that period. It is neither just nor reasonable that the mortgagee should be obliged to pay 'out of the income' of the mortgaged property, a loan which the mortgagor has taken for his own advantage. It is difficult to see why as between the mortgagor and mortgagee, the *takkavi* advance already obtained by the mortgagor should stand on any higher footing than any other prior mortgage, which a subsequent mortgagee may pay if he chooses, but which he is not *bound* to pay. And it is now settled that a puisne mortgagee is not by that circumstance alone, disabled from purchasing at a sale under a prior mortgage. If there are other facts showing that he took advantage of his position, that would be a different matter. It may be noted in passing that S. 73 of the Transfer of Property Act, in making an exception of sales occasioned by the mortgagee's default, refers only to 'failure to pay arrears of revenue or rent.'

Gangaram *v.* Laxman Ganoba, I. L. R. 40 B. 498.

This case is substantially identical in its facts with *Thiruvenkatachariar* v. *Seshadri Iyengar* [1]. Obviously just as the conclusion arrived at in the two cases may seem, it is difficult to disguise from oneself the anomaly of the position that a transferee from the vendor is worse off than the vendor himself, in relation to a person who is in possession under a mere contract for sale. The decision in *Kurri Veerareddi* v. *Kurri Bapireddi* [2], is being attacked frequently enough, but has not as yet been seriously shaken.

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1. (1916) 30 M. L. J. 559.   2. (1906) I. L. R. 29 M. 336.

Nabibhai Vazirbhai *v.* **Dayabhai Amulakh:** I. L. R. 40 B. 504.

This case deals with a somewhat novel point. The difficulty arises from the fact that it is not either purely a question of Municipal Law or altogether a question of Private International Law as ordinarily understood. The Indian Procedure Code allows the decrees of Courts in certain Native states to be 'executed' in British Courts, as if they were decrees of Municipal Courts. The question for decision in the case arose out of the difference between the laws of limitation prevailing in the two places, in respect of the execution of decrees. Ordinarily, as between two states, the *lex fori* governs in matters of procedure and limitation is comprised under that head; but does this rule apply to the case under consideration? It would be anomalous that while the Code provides that the Native state decree may be executed in British India as if it were a British Indian decree, Courts in British India should hold that by operation of the law of limitation it has ceased to be executable here even though it is in full force in the Native state. And the anomaly would be emphasised, if, as has been sometimes suggested, S. 47, Civil Procedure Code, should be held to bar a *suit* on judgments passed by Courts in such states. The question is not really one of 'jurisdiction' on the part of the executing Court to go behind the order of the Native Court but of the *law* applicable. The decree does not cease to be a foreign decree and the provision in the code only lays down the *manner* of realisation. It seems to us that the decision in this case as also that in *Jeewandas* v. *Ranchoddas* [1], has gone too far in treating the foreign decree as a Municipal decree *for all purposes*; see also *Herkun Chund* v. *Sizanender* [2]. Cf. the decision of a Bench of three Judges of the Madras High Court in *Veeraraghava Iyer* v. *Muga Sait* [3]. It would seem to be more consistent with the policy underlying the rule to hold that in executing such a decree the British Court is to a certain extent acting in aid of the foreign court and that the decree would be executable in British India so long as it is executable in the foreign territory itself. The reasonableness of this view would more clearly appear if we take the converse case, of the limitation law in the Native State prescribing a shorter period

1. (1910) I. L. R. 35 B. 103. 2. (1887) I. L. R. 14 C. 570. 3. (1914) 27 M. L. J. 535

for execution of decrees, than the law in British India. We are unable to believe that it was the intention of the Legislature that the foreign decree should be executable in British India even after its execution had become barred in the Native state.

Gurappa Shivgenappa *v.* Tayawa Shiddappa; I. L. R. 40 B. 513.

It is, in a sense, true that elaborate enquiries are not contemplated to be made under S. 7 of the Guardian and Wards Act, but we are unable to see the utility of appointing a guardian in the manner suggested in this case. The only property which the minor was alleged to be entitled to was her deceased husband's share in joint family property, but the opponents alleged that the husband had died undivided, and, with the ordinary presumption of jointness in her way, the minor widow could not claim even a *prima facie* right to that share. The language of S. 7 is of course very general—and advisedly so—but we doubt whether it was intended that a court should trouble itself to appoint a guardian of the 'property' of a minor, on the mere allegation of somebody that the minor is entitled to some property. We may add that it was not necessary for the minor's father to obtain an order of appointment under the Guardian and Wards Act, to enable him to sue on her behalf to assert her right to a share, on the footing that her husband had become divided.

Ram Prakash Das *v.* Anand Das, I. L. R. 43 C. 707.

The decision in *Vidyapurna* v. *Vidyanidhi* [1] placed heads of mutts on a peculiar footing and the pronouncement of the Full Bench in *Kailasam* v. *Nataraja* [2] certainly did not help to settle the law. Things were made worse by the decision of the judicial committee, by no means easy to interpret, in *Abhiram Goswami's Case* [3] where dealing with an alienation made by a Mohant, without any justifying necessity, their Lordships decided the question of limitation on the footing that the alienation was good for the life time of the grantor. We hope that the present case at least will bring us nearer to a definite solution. We must not omit to point out that as stated at p. 712 of the report, there

1. (1904) I. L. R. 27 M. 435. 2. (1909) I. L. R. 33 M. 265.
3. (1909) I. L. R. 36 C. 1003.

seems to have been no dispute before their Lordships as to the law on the subject and the general observations of their Lordships only reproduce the views stated in certain Indian decisions, so that it can scarcely be said that there was any investigation of the question by the Board. Curiously enough, *Vidyapurna* v. *Vidyanidhi*, [1] is not even referred to in the judgment. But we venture to think that the decision itself is substantially inconsistent with and must therefore be understood to overrule that in *Vidyapurna* v. *Vidyanidhi*, [1] the latter having proceeded on the footing that the Matadhipati for the time being 'is a real owner and not a mere trustee.' The Privy Council state the legal position in the following terms:—'The nature of the ownership is an ownership in trust for the mutt or institution itself and it must not be forgotten that although large administrative powers are undoubtedly vested in the reigning Mahant, this trust does exist and that it must be respected.' And in another part of the judgment they say 'the mahant is not only a spiritual preceptor but also a trustee in respect of the *asthal* over which he presides.' We may mention that in a recent case *Baluswami Aiyar* v. *Venkataswami Naicken* [2] Sadasiva Aiyar and Burn, JJ. held that *Vidyapurna* v. *Vidyanithi* [1] could no longer be considered good law.

Hemendranath Roy v. Upendra Narain Roy: I. L R. 43 C. 743.

If we may respectfully say so, this case correctly lays down the rule as to the province of Civil Courts in dealing with matters which lie ultimately in the discretion of the executive Government. It is one thing to say that the Court cannot examine the decision of the Executive and a very different thing to say that the Court should not adjudicate on the claims of rival claimants (in so far as there is a question of 'right' to the office) with a view to enable the Executive to act on a proper appreciation of their respective claims. The decision also clearly defines the limits within which a Court may grant to a party a relief not asked for by him in the plaint.

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1. I. L. R. 27 M. 435.

2. (1916) 32 M. L. J. 24.

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Chidambaramma *v.* **Hussanamma**: I. L. R. 39 M. 565.

There are certain considerations which make it difficult to accept the decision in this case as altogether sound. The judgment proceeds upon the following assumptions; first that when the widow's alienation is not for a purpose binding on the estate the interest acquired by the alienee is only a life interest; secondly that the reversion is in the widow as representing the estate; lastly presumably that that interest is disposable by her. It will be found on examination that none of these assumptions can be accepted without demur. While no doubt it is true that the interest acquired by the alienee is liable to be reduced to a life interest at the option of the reversioner, it is perfectly clear that the alienation is not absolutely void and (i) cannot be derogated from by the widow, (ii) can be ratified by the reversioner. The only persons who can object to the alienation are the reversioners and in the event of an escheat the Crown. *Bijoy Edpal Mukherji* v. *Krishna Mahishi Debi* [1], *Deo Nandan Pershad* v. *Udit Narayana Singh* [2]. We do not think it would be accurate to designate such an interest as a bare life interest. Again, having regard to S. 60 of the C. P. C., which makes power to dispose for one's benefit (understood liberally it may be) condition precedent for attachment, it is difficult to see how the reversionary interest can be attached and sold. With the alienation obviously her power to dispose of it is at an end. All this, of course, is apart from any question of fraud.

Raja of Karvetnagar *v.* **Venkata Reddi**: I. L. R. 39 M. 570.

One difficulty in accepting the judgment in this case on the preliminary point is that presented by the judgment of their Lordships of the Privy Council in *Shankar Sarup* v. *Mejo Mal* [3] where their Lordships say "the scheme of S. 295 is rather to enable the judge as a matter of administration to distribute the price according to what seem at the time to be the rights of parties without this distribution importing a *conclusive* adjudication on these rights which may be subsequently readjusted by a suit" taken with *Kotha Hnyin* v. *Ma Hnyin* [4] and *Sivagami* v. *Subrahmaniya Aiyar* [5]

1. (1907) I. L.R 34 C. 329, P. C.
2. (1911) 18 C. W. N. 940.
3. (1901) 23 All. 313 at 322.
4. (1911) I. L. R. 38 C. 717 (P.C.)
5. (1903) I. L. R. 27 M. 259. (F. B.)

which hold that there is no appeal from administrative orders. But it is just possible that their Lordships do not use the word 'administration' in the same sense in the two cases. Another difficulty is, can the order for rateable distribution be said to be made in each of the execution petitions? Is it not the case rather that the order is made in the suit in which the amount is realised, the decree-holders who have applied for execution of their decrees being given a statutory right to come in for rateable distribution? If this is the correct view, then the question such as that which arose in this case would not be one between the parties to the *suit* but one between one of the parties to the suit and a stranger. Questions that arise under S. 73 C. P. C. may belong to any one of the following categories, (i) questions between the judgment-debtor and the decree-holder in the execution of whose decree the assets were realised, (ii) questions between the judgment-debtor and another decree holder, (iii) questions between the decree-holder themselves, (iv) questions that affect the executability of the decree though raised as between the decree-holders. In case no (i) an appeal should lie, subject to what we said above as to the nature of the order, though other persons as well as party to the suit are interested in the question (*Prasanna Kumar Sanyal* v. *Kalidas Sanyal* [1]), and the appeal would lie whether at the instance of the other decree holders or the judgment debtor or the decree holder at whose instance the assets were realised. In a sense the three other classes relate to execution and arise between parties to suits; (cf. *Nadamunt Narayana Aiyangar* v. *Veerabhadra Pillai* [2]) but that does not seem to be the natural meaning of S. 47 and cases coming within Cl. (iii) would not seem to come within S. 47 and such a view would not involve any hardship as S. 73 cl. (2) gives a right of suit. The matter is different in cases coming within cl. (ii) and (iv). In cl. (ii) judgment-debtor is not given a right of suit by S. 73 which is taken away by S. 47 and to avoid the hardship it would seem to be necessary to hold that the order is a joint order on the execution petitions of all the decree-holders in which case, an appeal would lie at the instance of the judgment-debtor. *Venkatrama Sastriar* v. *Mangalathammal*. [3] Though there is no similar hardship in class (iv), still the logic of it would seem to require this case also to come within the appealable category, *Nadamut Narayan Aiyangar* v. *Veera-*

1. (1892) I. L. R. 19 C. 683. P. C. 2. (1910) I.L. R. 34 M. 417.
3. (1906) 17 M.L. J. 90.

bhadra Pillai [1]. The result of this view is that an appeal would be excluded only in the normal type of cases under S. 73 that is to say where the contest is only between the various decree-holders. In other cases, an appeal would lie but a suit would also lie by one decree-holder against another, the final adjudication affording the basis for the suit. We had a similar anomaly under the old code in certain cases coming within S. 244 for instance cases of restitution, questions as to who is a representative, &c.

Maharaja of Bobbili *v.* Narasaraja Bahadur: I. L. R. 36 M. 640 (P. C).

The facts in this case were these. Plaintiff obtained a money decree in the District Court of Vizagapatam. It was transferred to the Munsiff's Court at Parvatipur for execution and some immoveable property was attached but no further steps having been taken by the decree-holder, the application for execution was dismissed. On 9-7-1907, plaintiff applied to the Parvatipur Court for the copy of the decree which had been sent to it for the purpose of execution but he was informed that the same had been sent back to the District Court. He accordingly applied to the District Court on 13th December 1907 for sale of the properties attached and for a notice under S. 248 to show cause why the decree should not be executed. This petition also proved abortive. The next application was on 27-4-10 which was also made to the District Court for the sale of the properties attached by the Parvatipur Court. In his petition, plaintiff alleged that the decree had been sent back by the Parvatipur Court. On inquiry, it was found that this was an error. In the circumstances, the District Court held that the application of 1907 did not save limitation as it was presented to the wrong Court and dismissed the petition as having been barred and also apparently as having been presented to the wrong Court. The High Court in appeal confirmed the judgment of the District Judge. The High Court was of opinion that concurrent execution though permissible, was permissible only in exceptional circumstances and till permission was given so to execute, the application was incompetent and the Court that passed the decree was not a "proper Court" to apply to. In that view, the application for issue of notice under S. 248 though conceded to be a step in aid of execution

1. (1910) I. L. R. 34 M. 417.

was of no avail. The judgment of the Privy Council, so far as one could gather from the brief statement made by their Lordships of the reasons on which the judgment is based proceeded upon a somewhat narrower ground. Their Lordships say that after the transfer till the decree is returned to the extent that the decree could be executed by it, the Parvatipur Court was the only court to which application ought to have been made for execution and as such the application for sale of the properties attached by the Parvatipur Court made to the District Court was incompetent. The application relied upon in this case to save limitation, it might be noticed, was one not for attachment and sale but only for sale that is to say one to give effect to the attachment effected by the Parvatipur Court; whether if an independent application had been made to the Dt. Court for attachment and sale, that might have stood on a different footing their Lordships do not consider, but possibly their Lordships' judgment would have been the same. Their Lordships' judgment is however, no authority for the somewhat curious opinion of the High Court that an application for concurrent execution would not save limitation unless permission is granted for the same. Their Lordships' judgment proceeds upon the logically more satisfactory ground that to the extent the Court to which the decree is transferred could execute the decree, the Court that passed the decree is incompetent to execute the decree and therefore is not a proper Court to apply to. Whether the Court is a "proper" Court does not vary according to the decision of the Court upon the application but depends on the *competency* of the Court to grant the relief.

Their Lordship's judgment cannot also be taken as an authority for the position that the application for the issue of notice under S. 248 is not a step in aid of execution as no argument appears to have been founded before their Lordships upon the circumstance that the application contained a prayer for notice to issue and in itself sufficed to save limitation.

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Narayana Annavi *v.* Ramalinga Annavi : I. L. R. 39 M. 587.

Though we must confess that none of the reasons assigned by the learned judges for differing from *Srinivasa Aiyangar* v. *Thiruvengadatha Aiyangar* [1], appears to us to be convincing, nevertheless there is an aspect of the case which certainly deserves consideration and which distinguishes the present case from *Srinivasa Aiyangar* v. *Thiruvengadatha Aiyangar* [1], and the case in *Karuturi Gopalan* v. *Karuturi Venkataragavalu* [2], where the conclusion in *Srinivasa Aiyangar* v. *Thiruvengadatha Aiyangar* [1], is accepted. The suggestion that the injunction might not impose a legal obligation is easily dismissed by a reference to the context as well as the language employed. The duty is laid down with reference to partition, and is imposed on the property. It is placed on the same level with the duty to marry sisters. The objection on the ground that the liability is prospective is shared along with maintenance and the other objection that the amount if not required would not revert, could be easily met by making it expressly revertible. The difficulty in assessing the amount required for a future necessity cannot be greater than in assessing damages in the case of anticipatory breaches of contracts. By not assessing the amount at the time of the partition, on the one side, there would be an indefinite liability hovering on the share of the other coparceners, on the other, the right of the person entitled to contribution might be defeated by alienations in the interim. There is no objection to the amount being made payable on the happening of the contingency, and the circumstance of an earlier payment can always be taken account of in fixing the amount. The long standing practice also seems to be in support of the view taken in *Srinivasa Aiyangar* v. *Thiruvengadatha Aiyangar* [1], (see Strange vol. II, p. 286). But the marriage expenses sought to be provided for in this case were not those of brothers but of brother's sons and this naturally raises the question whether the text could be extended to cover such a case. It has been decided that when the partition is between brothers and brothers' sons the latter are not entitled to be paid the expenses of their marriage. There does not seem to be good reason to differentiate the case where the division is between brothers' sons. So far as one could argue upon analogy it looks as if the liability to marry whether

1. (1912) I. L. R. 38 M. 556.   2. (1915) 29 M. L. J. 710.

males or females is a charge on their father's share; a sister's share is to come out of her brother's share.

There is also a practical difficulty in assessing the amount that ought to be paid. While one branch may consist of 5 members, another might consist of only one member it would certainly be hard if one member should provide for the marriage of five because he has been married at the family expense in addition to his share having been subjected to necessarily larger expenditure for their maintenance &c., during the joint status. The only way in which the case can be made to be covered by the text is by reading the text distributively. This view of the text may be supported by the following arguments. First, it is clear from the language of Vignaneshwara that the sisters also are comprehended within the rule (*cf.* also Vyavahara Mayukha Ss. 38 and 39.) Secondly we have a clue in the interpretation clause (Mitakshara Chap. I, Sec. I, Pl. 5) to the same effect. " Paternal here implies" "says Vijnaneshwara while defining Daya, any relation which is cause of property. By sons, indicates, relationship in general." But the argument is not convincing. Anyhow the restriction imposed by *Srinivasa Aiyangar* v. *Thiruvengadatha Aiyangar* [1] namely that the claim can be made only when coparceners of the same degree are married seems to be necessary.

In so far as this case decides that the status of a joint family is severed only by the decree, it need hardly be pointed out that it is no longer authority in view of the Full Bench decision of this Court in *Soundararajan* v. *Arunachellam* [2] and the decision of the Privy Council in *Musammat Girjabai* v. *Sadashiv Dhundiraj* [3].

Munguluri Sivaramayya v. Bhujanga Rao: I. L. R. 39 M. 593.

With all deference, in the matter of the applicability of S. 5 of of the Limitation Act to appeals under the Provincial Insolvency Act, we prefer the view of Mr. Justice Sadasiva Iyer. We cannot agree that S. 5 affects or alters the period; on the other hand what it does, is to excuse the consequences of the application of "the period", S. 5 does not stand on the same footing as S. 12 which is the subject of the Full Bench in *Abubucker Sahib* v. *The Secretary of State for India* [4]. The Full Bench decision is bad

1. (1915) 29 M.L.J. 710. 2. (1915) I.L.R. 39 M. 159.
3. (1916) 31 M.L.J. 455=L.R. 43 I.A. 151. (P.C.) 4. (1909) I. L. R. 34 M. 505.

enough by itself and taken with the view expressed in this case by Mr. Justice Oldfield, the application of the general provisions of the Limitation Act is *practically* confined to the suits governed by the Schedule to the Act but that is obviously not the intention of the legislature for where it is so to be confined the Act expressly says so (see S. 6 of the Act). The powers claimed by the Court in this case under the Charter Act may appear to be large but there is no harm, so long as they are only held in reserve to be used in exceptional cases.

Mohideen Ibrahim Nachi *v.* Ibrahim Saheb: I. L. R. 39 M. 608.

As we cannot agree that the judgment of the Privy Council in *Annie Besant's Case* [1], could be as easily got rid of as the Bombay High Court are disposed to think, in *Achratal Jekesandas* v. *Chennalal Parbhedas* [2], the interpretation put upon S. 25 in this case is to be preferred to the more narrow construction placed upon the section in the latter case. It is supported, from the analogies drawn from the language used in the Penal Code with reference to kidnapping.

Narayana Singh *v.* Aiyasami Reddi: I. L. R. 39 M. 602.

We are afraid that in the judgment under review there is some misapprehension as to the facts of the case in *Phulkumari* v. *Ghanshyam Misra* [3].

There as here there was a claim (*a*) (i) that the plaintiff's title be declared (ii) that the defendant second party (judgment-debtor) had no right or title left in the said properties, (*b*) that it be further declared that the said properties were not liable to be sold in execution of the decree of the defendant first party against the defendant second party, (*c*) that a permanent injunction may issue on the defendant 1st party and their Lordships say "their Lordships are not satisfied that, even if the value of the action determined the fee, the respondents [that is the defendants] have rightly ascertained the value. What they have done is simply to take the sum in the execution decree. This is plainly a fallacious proceeding. The value of the action must

1. (1916) I. L. R. 38 M. 807. 2. (1916) I. L. R. 40 B. 600.
3. (1907) I. L. R. 35 Cal. 202.

mean value to the plaintiff. But the value of the property might quite well be Rs. 1000 while the execution debt was Rs. 10,000. It is only if the execution debt is less than the value of the property that its amount affects the value of suit." This is exactly what *Krishnan Naidu* v. *Somasundram Chettiar* [1], says but the facts of this case may bring it within the reservation in the Full Bench case.

Narayana Muthad v. The Cochin Sarkar: I. L. R. 39 M. 661.

S. 86 of the Civil Procedure Code provides that Sovereign Princes or Chiefs may be sued with the consent of the local Government etc., but not without such consent. The question in this case was whether the privilege conferred by the section may not be waived and whether on the facts of the case, the privilege could be said to have been waived. The rule of international law is that a foreign Sovereign cannot be sued, (*Mighell* v. *Sultan of Johore* [2], *Statham* v. *Statham* [3]), though it is open to such Sovereign Prince when sued to submit to the jurisdiction of the Court. As laid down in *In re Republic of Bolivia Exploration Syndicate Ltd.* [4], the waiver of this privilege can take place only on clear proof of election with full knowledge. The test of submission to jurisdiction in the case of private persons cannot appropriately be made the test of submission in the case of Sovereign persons. In the former case, there is no privilege to be waived, the only question being whether there has been a voluntary submission. In the latter the question is whether there has been an election to waive the privilege and such an election can obviously not be inferred when there is a clear demurrer to the jurisdiction of the Court. Though at one time there was considerable doubt whether when there is a clear demurrer to the jurisdiction, even in the cases of private persons, a submission could be inferred, the later developments of law have construed a pleading on the merits as a submission notwithstanding such demurrer. (See *Rama Iyer* v. *Krishna Pattar* [5],) but in the absence of such a course of authorities in the case of Sovereign Princes, an inference of agreement to submit would for obvious reasons be inadmissible. We cannot however agree that the privilege conferred by the section cannot be waived. The section does not state the consequence of a non-

1. (1907) I. L. R. 30 M. 335.
2. (1894) 1 Q. B. 149.
3. (1912) P. 92.
4. (1914) 1 Ch. 139.
5. (1915) I. L. R. 39 M. 733 (F. B.)

compliance with the rule and the ordinary principles governing objections to personal jurisdiction (see *Sukh Lal Sheikh* v. *Tava Chand Ta* [1]) would seem to justify the application of the doctrine of waiver.

Shaik *v.* **Muhammad: I. L. R. 39 M. 664.**

In a case coming under the Bengal United Provinces and Assam Civil Courts Act, their Lordships of the Privy Council held that a usage is provable though at variance with the Mahomedan Law *Mahomed Ismail Khan* v. *Lala Sheo Mukh Rai* [2] *a fortiori,* evidence would be admissible in cases coming under the Madras Civil Courts Act which is more tender to usages and expressly preserves them in Sec. 16. It is a question of fact in each case whether a particular custom obtains in any community though it must not be forgotten that a description of this particular question as a question of fact is not decisive of the further question whether a second appeal would lie with respect to it *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* [3]. Anent the question of usage, courts are disposed more or less in their favour according to the communities in respect of which the question arises and the kinds of usages that are set up. In some cases, like the Tiyans of Malabar the Courts start with no predisposition in favour of any rule whatsoever; in other cases like that of Nambudris they start with certain tendencies but are not positive one way or other. When we come to the lower classes of Hindus again, the Courts are prepared to start with an open mind though if they are not convinced, they go by the general rule of Hindu Law. In the cases of ordinary Brahmins, they are reluctant to accept usage and are prepared to accept it only after. In the case of Mahomedans, the Prophet is more exclusive than the Hindu sages and generally, the disposition is strongly against the acceptance of usages at variance but if they are clearly proved, they are accepted even here. In certain well marked areas like Malabar, the Courts start with certain preferences for certain usages; though less markedly, Mr. Justice Srinivasa Aiyangar is prepared to go with an open mind in the case of Lubbais and other recent converts to Mahomedans. Their Lordships held in this case that a custom among the Lubbais of Coimbatore District excluding females from inheritance was made out.

1. (1905) I.L. R. 33 C. 68. 2. 17 C. W. N. 97.
3. (1904) I. L. R. 29 M. 24, 26.

Narayanaswami Naidu *v.* **Subrahmanyam : I. L.** R. 39 M. 683.

If the inam villages in which minor inams exist do not come within the definition of an estate, all the agraharam, shrotriyam and mokhasa villages would be excluded from the definition and this, as Mr. Justice Srinivasa Iyengar rightly observes, cannot have been the intention of the legislature. The definitions of the Act on this point are in the highest degree curious. While the definition of an estate is "any village of which the land revenue alone has been granted in inam to a person not owning the Kudivaram thereof" &c., village is defined as "any local area situated in or constituting an estate designated a village in the Revenue Acts &c." In these circumstances one has to fall back on the meaning of the word as ordinarily understood. A village, ordinarily speaking, is a revenue unit within well defined boundaries and if the entire available revenue thereof is granted to a person not owning the Kudivaram the grantee is the holder of an estate. A receiver would be a land-holder within the definition of that term in S. 3 (5) and there is nothing repugnant in the subject or context to that construction in S. 6, on the other hand, induction of a tenant is but an ordinary act of management and there is no reason why the ordinary legal consequence intended to be attached to such act by the proprietor should not apply to the act of the receiver who acts for him.

Eswara Iyer *v.* **Govindarajulu Naidu:** I. L. R. 39 M. 689.

S. 17 of the Presidency Insolvency Act prohibits the commencement of any suit or legal proceeding except with the leave of the court by any creditor to whom the insolvent is indebted in respect of any debt provable in insolvency. The question in this case was whether an application for arrest of the insolvent in execution of a decree is a legal proceeding within the meaning of the section and their Lordships held that it is, we think rightly.

Rama Iyer *v.* **Krishna Pattar**: I. L. R. 39 M. 733 (F. B).

Of all topics of law, International Law is the one on which uniformity within the British Empire should in the fitness of things be maintained and we think the Full Bench did right in overruling *Parry and Co.* v. *Appasamy Pillay* [1] which was inconsistent with the later English cases.

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1. (1880) I. L. R. 2 M. 407.

NOTES OF INDIAN CASES.

Sayad Amir Saheb *v.* Shekh Masleudin: I. L. R. 40 B. 541.

The position of the Court of Wards in relation to rights of trusteeship vested in a ward is perhaps not very clear, but we do not think there is anything to support the view that a suit for removal of the ward from the management is a suit 'relating to the person or property of the ward.' Where however the suit involves something more than mere removal, especially if it includes a claim to recover moneys from the estate of the ward on the ground of breach of trust, etc., the position becomes different. We venture to think that in deciding 'the nature of the suit' it would be erroneous to exclude from consideration 'the possible consequences' of the suit. The argument of the learned Judges based on the distinction between the expression 'relating to the property of the ward' and 'affecting the property of the ward' is not without weight (cf. the observations of the Madras High Court in *Venkatachalapati* v. *Siva Row Naidu Bahadur* [1]); but the result arrived at by them would have the effect of making the property in the hands of the Court of Wards liable for many a decree which the court may not have had an opportunity of contesting, a state of things that seems to us inconsistent with the policy underlying that legislation. We would also observe, in passing, that the decisions of the Calcutta High Court substantially agree with the Madras view, placing a wide construction upon the words 'relating to the property' of the ward (see *Gobind Sahae* v. *Udit Narain Singh* [2] *Ananda Kumari* v. *Durga Charan* [3].

It is no doubt in a sense true that a decree for damages against a defaulting trustee proceeds on the assumption that to that extent he is in possession of the trust property; but this is not always so (as for instance, in cases of loss arising from negligence &c.) and in any event the legal assumption as to the basis of the liability will not avail when it comes to the question of executing the decree against what is undoubtedly the property of the ward, in the charge of the Court of Wards. It only stands to reason that unless the decree has been so framed as to be binding on the Court of Wards, no properties of the ward can be reached for satisfaction of the decree, *Gobind* v. *Udit Narain* [2]. This brings us to the other point dealt with in the case. We are, with all respect, unable to agree with the view, that even in

1. (1912) I. L. R. 37 M. 388. 2. (1912) 17 C. L. J. 501.
3. (1915) 22 C. L. J. 592.

suits falling within the Act, the representation of the ward by a guardian other than the Court of Wards is a mere 'irregularity.' The point seems to us to be governed not by the principle of the decision in *Walian* v. *Banke Behari* [1], where the question related to the manner of appointment of the guardian *ad litem*—but by that in *Rashidunnissa* v. *Muhamad Ismail* [2], which lays down the true rule of construction in respect of the provisions relating to the persons who are to be appointed guardians.

Pandurang Laxman Uphade *v.* Govind Dada Uphade: (40 B. 557).

It is much to be regretted that on a question of practice like the one arising in the present case there should be a marked diversity of judicial opinion. Taking the language of the provision in S. 310-A. of the Code of 1882 in its ordinary sense, one should have thought that the right to apply under it could be availed of only by a person who had an interest in the property *at the time of the sale.* The decisions in *Appaya Shetty* v. *Kunhati Beari*[3] and *Manickka Odayan* v. *Rajagopala Pillai*[4] allowing such a right even to a private transferee *after* the sale were an unwarranted extension based upon a misapplication of certain observations in *Erade Manikkoth Krishnan Nair* v. *Puthiedeth Chembakkoseri Krishnan Nair* [5] and 30 B. 577 relating to the case of a transferee before the sale, though after attachment. The legislature intervened in 1908 not merely to make it clear that even persons with *limited* interests in the property could take the benefit of the section but also, as we should think, to overrule the view taken in *Appaya Shetti* v. *Kunhati Beari* [3] and *Manickka Odayan* v. *Rajagopala Pillai* [4] (see *Dulhin Mathura* v. *Bangsidhar* [6].). In *Lakshmi Ammal* v. *Sankaran Nair* [7], however, the Madras High Court greatly narrowed the scope of the amendment, in this respect, by restricting the words " by virtue of a title acquired before such sale " in O. XXI R. 89 to cases where the applicant has only an 'interest' as distinguished from 'ownership' in the property. With all respect, it is difficult to see any logical basis for the distinction between transferees of limited interests and of the full ownership and the decision seems to rest more on considerations of what is assumed

1. (1903) I. L. R. 30 C. 1021.
2. (1909) 19 M. L. J. 631. (P.C.)
3. (1906) I. L.R. 30 M. 214.
4. (1907) I. L. R. 30 M. 507.
5. (1902) I. L. R. 26 M. 865.
6. (1911) 15 C.L. J. 83.
7. (1918) 24 M. L. J. 205.

to be the policy of the rule than upon its language. In the later case of *Subbarayudu* v. *Lakshminarasamma* [1], one of the learned judges approved of this decision while the other reserved his opinion, but both of them concurred in holding that the person who was the owner of the property at the time of the execution sale would lose his right to apply under the section if in the meanwhile he had privately transferred the property.

The Allahabad High Court on the other hand while agreeing with the Madras view that the judgment-debtor cannot after a private sale (subsequent to the Court sale) apply under rule 89, seems also inclined to hold that even the transferee cannot apply *Ishar Das* v. *Asaf Ali Khan* [2]. Now we find the Bombay High Court laying down that the judgment-debtor can take the benefit of the rule in spite of the subsequent alienation and both the learned judges clearly intimate their opinion against the right of the transferee to come in. Here is certainly an interesting illustration of the so called certainty of codified law.

The position is, to say the least, far from clear; and no possible construction of the rule altogether escapes illogicality. It is fairly clear that both under the older rule and *a fortiori* under the present, the legislature proceeded on the basis of the rights existing *at the date of the sale*. It is asked (in *Lakshmi Ammal* v. *Sankaran Nair* [3],) why should the legislature be presumed to have favoured a purchaser after attachment and before the Court sale but not one after the sale. The matter seems to us not to be one of presumption of intention. It is obvious that in the former case the transferee had become the owner of the property at the date of the Court sale (though liable to be defeated by the Court sale) but not in the latter. The assumption that the ownership of the property *at the date of the application* is sufficient to support the application is clearly opposed to the language of the rule, especially in view of the words introduced by the new code. There is more difficulty in dealing with the other side of the question dealt with in *Subbarayudu* v. *Lakshminarasamma* [1] and *Ishar Das* v. *Asaf Ali Khan* [2], *viz.*, that the existence of an interest in the property at the date of the application is *necessary* to support such an application. It seems to us erroneous to regard the right to apply under rule 89 as a kind of legal incident naturally connected with a right of property and

1. (1918) I. L. R. 38 M. 775. 2. (1911) I. L. R. 34 A. 186.
3. (1918) 24 M. L. J. 205.

thence conclude that such right of property must exist at the date of the application. We fail to see how after the Court sale the judgment-debtor or any other person whose interests in the property are bound by the sale can in any real sense be regarded as continuing to retain his rights in the property. Under the present Code, at any rate, the necessity for confirmation before the sale can become absolute does not logically bear on the question of the passing of the property any more than the necessity for registration of the sale deed in the case of a private sale. Before the rule in S. 310 A was enacted, there existed the other provisions of the code relating to the confirmation of the sale as well as the setting aside of the sale. (on the ground of material irregularity etc.) The right to set aside was strictly limited to certain defined causes and except in such cases, confirmation had to follow as a matter of course. It will be arguing in a circle to say that the introduction of the wider right, to apply under S. 310 A, recognised a continuing ownership in the judgment-debtor and thence say that the right to apply under that section is an incident of such ownership. Some confusion on the question of the passing of the property from the judgment-debtor no doubt existed till recently because of the provision in the Code of 1882 that as between the parties to the suit the title shall vest in the purchaser 'from the date of the certificate and not before.' But all arguments based on this provision have been got rid of by the change in the new code (S. 65) which vests the property in the purchaser as from the date of the sale. The proper view seems to us to regard the right of application under Rules 89 and 90 of O. XXI as statutory privileges allowed to certain persons, no doubt on the ground of their interest in the property sold but not necessarily as incidental to a proprietary interest treated as inhering in them at the date of the application. The decisions in *Subbarayudu* v. *Lakshminarasamma* [1] and *Ishar Das* v. *Asaf Ali Khan*[2] lay stress not merely on some such inherent connection between the proprietary interest and the right to apply, but on the words 'owning' (such property) 'or holding' (an interest) in the rule, which seem clearly to imply the *continuance* of the proprietary connection down to the date of the application. The force of the latter argument cannot be denied, nor is it sufficiently met by the observation in the Bombay case that the rule does not in terms say that the right or interest should exist

1. (1918) I. L. R. 38 M. 775. 2. (1911) I. L. R. 34 A. 183.

'at the date of the application.' We fail to see the logic of the position there taken by the learned Judges that in spite of the court sale, it is possible to regard the Judgment-debtor as in some sense 'the owner of the property in the eye of the law,' so long as the sale remains unconfirmed, and yet negative the incident of 'transferability' to this ownership. It is one thing to say that such a transferee is not within the terms of rule 89, but a different thing to say, as the learned judges do, that till the sale is set aside, the original owner—though still continuing to be 'owner' in some sense—has no title to transfer. It is certainly not consistent either with the form or with the substance of the transaction to suggest that in such cases the transaction between the debtor and his transferee must be regarded as amounting only to an 'agreement to transfer'. It is of course open to the parties to enter into a mere 'agreement' so as to avoid all difficulties under rule 89, but where for whatever reason they do not choose to do so, it is not for the court to say that the transaction cannot amount to anything more than an agreement to sell.

Arjun Ramji *v.* Ramabai : I. L. R. 40 B. 564.

The question raised in this case is practically one of first impression. A person to whom a cause of action to sue for possession accrued during his minority died nearly 9 months *after* attaining majority. The ordinary period of 12 years expired a few months after the death of that person and after such expiry, his legal representative brought the suit. The question was whether that suit was in time. The learned Judges answer it in the affirmative. We must confess we feel grave doubts as to the soundness of this decision. If the *quondam* minor had continued to live he would of course have had three years from the date of his majority within which to sue; if again, he had died while yet a minor—even if it be just a few days before attaining majority—his legal representative would have had at least three years from the date of such death. But once he attained majority, it seems to us that when he dies, the privilege of suing (in spite of the expiry of the ordinary period of limitation) would die with him too. It is clear that a supervening disability, if it sets in *after* the attainment of majority, will not avail to extend the time. Again if the cause of action had accrued during the predecessor's lifetime the minority of the successor in title would be of no avail,

however short might have been the interval of time between the accrual of the cause of action and the death of the person to whom it had accrued. It may no doubt be said that these cases are not analogous and that the hardship in such cases is not very great, because the next friend at least could sue, during the disability. But it appears to us that there is no warrant for the general assumption that as long as the right to the property in the hands of the quondam minor is not extinguished by lapse of the extended term prescribed, the right to sue for it is a kind of *substantive* right independent of the personality of the minor.

Anomalous, as it may seem, there is much to be said for the view that the privilege of suing within the extended period is 'personal' to the minor in the sense that it cannot be availed of by a transferee from him. [The personal character of the similar privilege conferred upon Government is now established beyond question (see *Jagadindranath* v. *Hemanta Kumari* [1].)]

Why should the 'legal representative' stand on a better footing. We are unable to see how the definition of 'plaintiff' in S. 3 helps us to construe S. 6. And though the third clause of S. 6 may not suffice to *exclude* the present case from the section and may be explained as necessary for other reasons—such as the fixing of a different starting point or as providing for a case not covered by the first clause—there is nothing in the language of the first clause of the section to cover the present case. The decision in *Mahadev* v. *Babi* [2] throws no light whatever on the present question. It only draws attention to the distinction suggested by the third clause of the section between the case of a 'legal representative' and that of a 'transferee.' As for the argument based on S. 89 of the Probate and Administration Act or the general principle of continuity of personality between a person and his 'legal representative', it is begging the question to assume that the privilege of suing within the extended time survives the minor. The policy of the Limitation Act would seem to be that once a person is in a position to sue (by himself) he postpones his suit *at his peril.*

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1. (1904) I. L.R. 32 C. 129 (P.C.). 2. (1902) I.L. R. 26 B. 703.

NOTES OF INDIAN CASES.

Laljee Mahomed *v.* Guzdar: I. L. R. 43 C. 833.

In view of the frequency with which the matter has latterly come up for consideration and of the numerous and diverse, not to say conflicting, dicta on the point, we would invite special attention to the full discussion in the Judgment of Mr. Justice Mookerjee, in this case, of the question of the propriety of an Appellate Court interfering with findings of fact of the Court of first instance when such findings are based on conflicting oral testimony.

Mathura Sundari *v.* Haran Chandra: I. L. R. 43 C. 857.

The relation of S. 15 of the Letters Patent of the High Courts to the several provisions in the Indian Procedure Code as to appeals from orders &c. is far from definitely settled yet. Though the Indian Legislature has power to affect the provisions of the Letters Patent, there is nothing in the Code at present to restrict the operation of clause 15 of the Letters Patent. But the question whether the right of appeal under that clause has been *added to* by the provisions of the Code has given rise to some diversity of opinion.

Chutterput Singh *v.* Sait Sumari Mull: I. L. R. 43 C. 903.

The delegation of quasi judicial functions to the Registrar seems to give rise now and then in Calcutta, to important questions as to the true limits of his jurisdiction. Sometime ago a Full Bench had to consider the effect of his granting leave to sue under the Letters Patent. *Laliteshwar Singh* v. *Rameshwar Singh* [1]. In the present case, the decision turned on the effect of an order by the Registrar for transmission of a decree to another Court for execution, which, it was claimed amounted to an *implied* decision by him that the decree was executable. It may at this stage be pointed out that in *Saja Hossein* v. *Monohur Das* [2], and *Emrao Singh* v. *Lakshmi Narain* [3], the order for transmission had been made by the Judge himself. But even apart from this difference we respectfully think that the conclusion arrived at by the Full Bench in the present case is the more reasonable one. The application of the rule of finality to orders in execution proceedings, especially in the case of orders passed *ex parte*, must be strictly limited by reference to the substance of the petition on

1. (1907) I. L. R. 34 C. 619. (F. B.) 2. (1896) I. L. R. 24 C. 244.
3. (1904) I. L. R. 26 A. 361.

which the order in question has been passed and it will be dangerous to extend its effect by any principle of implied or constructive adjudication. A person on whom a notice is served to show cause against a particular petition—in this case, an application for transmission of a decree to another Court—may not appear to contest it, in the belief that the award of the relief claimed in that petition will not affect him, but that ought not to be held to preclude him from contesting subsequent petitions for other reliefs which do not necessarily arise out of the former petition.

As to the other point mooted in the case, *viz*, the functions of a Court that is asked to transmit its decree for execution to another Court, it is by no means clear whether in dealing with such an applicationthe court is confined to a consideration of the matters specified in the sub-clauses of S. 39. If the correct view be that an application under S. 39 relates to a stage prior to and different from that of execution properly so called, it would seem to follow that the court is not at that stage called upon to enter into questions that will arise only when the application for execution is made. If, on the other hand, the words 'send it for execution' in the section, can be held to imply that the court is to decide the question of the 'executability' of the decree before sending it 'for execution' to another court, the court can—and properly must—decide questions relating to that point even in dealing with applications under that section. But it is certainly undesirable that it should be a matter of *option* with the court to deal or refrain from dealing with such other questions at that stage. On the answer to this question will depend the further question, whether or not a notice under O. 21, R. 22 (old S. 248) is necessary in the case of an application under S. 39; but we do not think it right that a court should take action under S. 39 without any notice to the judgment-debtor.

Uzir Ali Sardar *v.* Savai Behara: I. L. R. 43 C. 938.

It is to be regretted that the new code did not attempt to settle the conflict of rulings as to the power of an Appellate Court to remand a case in circumstances not falling within S. 562 of the Code of 1882 (now O. 41 R. 23.) The decision in *Habib Baksh* v. *Baldeo Prasad* [1], and the cases following it clearly showed the necessity for the recognition of such power in certain cases, but it has been stated that the special committee that settled

1. (1901) I. L. R. 23 A. 167.

the present code were not inclined to embody that view in the code. S. 564—which in terms forbade a remand in cases not covered by S. 562—has however not been re-enacted; and this omission has in turn led to some difference of opinion as to its effect. The result is that there are several cases holding that the power of remand is wider under the new code than before. See for instance *Muthusami Odayan* v. *Kolandavelu Odayan* [1], while other decisions maintain the contrary (cf. *Nabin Chandra* v. *Pran Krishna*) [2]. An intermediate view has been suggested in *Narottan* v. *Mohun Lal* [3]. It must however be observed that the mere omission of S. 564 will not suffice to give the power and that has therefore to be found somewhere else. As to this, the decisions are not altogether clear, whether it is to be found in the general language of S. 107 or in S. 151 which gives statutory sanction to the doctrine of inherent power. One direct consequence of the omission of S. 564 is to give scope for the argument that an unauthorised remand is at any rate only an irregularity falling within the operation of S. 99 of the Code and not an illegality (as held under the old Code, see *Palani Chetti* v. *Rangiadoss Naidu* [4].)

Gangadhar Bogla v. Hiralal Bogla: I. L. R. 43 C. 944.

It cannot be denied that some at any rate of the Hindu Law texts are unfavourable to the view that an adopted son stands for all purposes on the same footing as an *aurasa* son. We also venture to think that there is something to be said for the view that the rule as to inequality of shares, laid down in the text of Vasishta, in case of a partition between an adopted son and an after born *aurasa* son of the *same* father, implies a similar inequality in all cases of competition between them, other conditions being equal; and this is supported by the analogy of the rule applicable to cases of competition between kindred of the full blood and of the half blood. But the decisions of the highest tribunal, including the latest, in *Nagindas* v. *Bachoo* [5], have made it impossible for courts in this country to give effect to this view.

The other point raised in the case, related to the claim of a 'stepson' to come in within the rule allowing a 'son' to succeed to his mother's Stridhana. So far as this was overruled on the strength of the word अनपत्याय in Mitakshara II xi 10, we would

1. (1914) M. W. N. 90.
2. (1913) I. L. R. 41 C. 108.
3. (1912) I. L. R. 37 B. 289.
4. (1908) I. L. R. 32 M. 83.
5. (1915) I. L. R. 40 B. 270. (P. C.)

observe that the very point left open by Mookerjee, J. (at p. 967) *i.e.*, whether that word would cover the case of a son *adopted* by or in conjunction with the woman herself, shows the danger of laying undue stress on the literal meaning of that term as referring to 'issue *born* of her.' We are however unable to say that the learned judges erred in rejecting the argument based on the text of Manu (Ch. 9 Sl. 183) that by the birth of a son to a co-wife, the other wives also become 'mothers of male children through that son.' For, as observed by the Privy Council in *Annapurni* v. *Forbes*, [1] such texts, if applied to the law of inheritance in the way contended for, 'would prove too much; they would be equally good to prove that a natural mother and her co-wife stand on an equal footing, which is clearly not the case'.

Jatindra Nath Basu *v.* **Peyer Deye Debi** : I. L. R. 43 C. 990. (P. C.)

The Judgment in this case is, we regret to say, far from informing. The suit was brought for specific performance of a contract for the purchase of a decree for sale of mortgaged properties. The execution of the decree had been allowed to become barred between the date of the contract, and the institution of the suit and that was relied on as a defence to the claim for specific performance. It cannot of course be disputed that in the absence of an assignment in writing the purchaser could not have taken steps to execute the decree or keep it alive. But there is some difficulty in following their Lordships' conclusion that the necessary result of the decree becoming barred was to render the contract unenforceable. It will be noticed that there is no investigation by their Lordships of any question as to the party by whose default the execution of a formal assignment was delayed. The judgment of the High Court was based on the finding that the real consideration for the contract was something more than the mere benefit under the decree, that the purchaser had had the full benefit of that real consideration, and that as for the non-execution of a formal assignment of the decree it was not due to any default on the part of the vendors but to the evasive and obstructive tactics of the vendee. None of these considerations is adverted to in the judgment of the Privy Council; and if that be because their lordships thought them immaterial it is difficult to understand the reason for it.

1. (1899) I. L. R. 23 M. 1.

The bar of limitation in respect of the executability of the decree cannot make the case for specific performance worse than the destruction of the subject matter of the contract; and as to this, the rule in England is "clearly settled that the destruction or failure of the subject matter of a contract after it is entered into does not relieve a purchaser from the obligation to perform it" (*See Coles* v. *Bristowe*[1]. See also Fry on Specific Performance S. 1528 and S. 914 et seq.). We are not unmindful of their Lordships' frequent warning to courts in India against the danger of importing the doctrines of English equity but the rule above referred to is substantially enacted for India by S. 13 of the Specific Relief Act. There may be a question as to whether illustration (a) to that section does not go beyond the terms of the section itself. But it is unnecessary to pursue that matter here in view of the fact that their Lordships' judgment does not deal with the argument urged by counsel on foot of Ss. 13 and 14 of the Specific Relief Act.

It may be said that the present case is distinguishable from that contemplated by S. 13 on the ground that the vendors could have kept the decree alive if they so chose and that it was by their default or negligence that the decree became barred. But it is difficult to see how that will affect the present question unless there is any principle of law imposing such an obligation on the vendors. This in a way raises the question whether the purchaser did not become the owner of the decree until the execution of the formal assignment. For, if he had already become the owner in equity the loss must be borne by him; whatever other remedies he may have for damages against the vendors on the ground of their negligence. The High Court found—and this finding is not questioned by their Lordships—that long before the decree became barred the vendors gave notice to the purchaser of their readiness to execute an assignment and that they even gave him notice that the decree would soon become barred. The assignment was to be made only on the vendee paying the stipulated price but he would not pay it and began to raise all kinds of objections, evidently because he had already gained the ulterior purpose for which he had entered into the contract. It is no doubt true as pointed out by their Lordships that the agreement was 'executory' but that does not mean that there was no complete contract; and the purcha-

1. (1868) L. R. 6 Eq. at p. 159.

ser cannot take advantage of his own default to throw upon the vendor the obligation to take further care of the subject matter of the contract beyond the time fixed for completion. The ordinary rule (in England) is that the vendor is not answerable for what may happen to the property after the time when the purchaser *ought* to have taken possession. (See *Minchin* v. *Nance* [1]. Fry S. 1437).

Their Lordships observe that a transfer of the decree could, by reason of S. 232 of the Civil Procedure Code of 1882, be effected only by an assignment in writing and it looks—though they do not say so—as if they acted on the analogy of the provisions in Ss. 54 and 55 of the Transfer of Property Act by which the theory of equitable ownership is excluded and it is left to the vendor to preserve the property till it is delivered and bear the loss arising from its destruction before the title is formally transferred. If this be the basis of the judgment, we beg leave to doubt if S. 232 Civil Procedure Code (now O. XXI R. 16) is really analagous to S. 54 of the Transfer of Property Act. It does not provide that the title to the decree cannot be transferred except by an assignment in writing but only requires such a document as a condition precedent to the transferee executing the decree. That this is a mere rule for purposes of execution proceedings is shown by the fact that even an assignment in writing does not *as of right* entitle the assignee to execute the decree and instances are not uncommon in which the executing court refuses to allow such an assignee to come in and refers him to a regular suit to establish his rights. There is no rule of law which excludes decrees from the operation of the rule of transferability without writing under S. 9 of the Transfer of Property Act, for, a decree (even though it may direct a sale of immoveable property) is not itself immoveable property within the meaning of S. 54 (*Cf. Gous Mahomed* v. *Gawas Ali Khan* [2], under the Registration Act), nor is it 'actionable claim' within the meaning of S. 130. (See *Afzal* v. *Ram Kumar Bhudra* [3] and *Dagdu* v. *Vanji* [4]).

Bapu v. Bapu: I. L. R. 39 M. 750. (F. B.)

It is no doubt somewhat curious that the same matter if it should be dealt with by the High Court as a revision under S. 439 (for the power of the High Court to deal with sanction proceedings

1. (1841) 4 Beav. 332.
2. (1896) I. L. R. 23 C. 480.
3. (1886) I. L. R. 12 C. 610.
4. (1900) I. L. R. 24 B. 502.

under that section if it so chooses is not excluded by the decision of the F. B.) the opinion of the third Judge should be taken while if it came as on appeal under S. 195, the judgment of the Senior Judge is to prevail but such inconsistencies are not lacking in the history of Indian Legislature which is due to the non-adoption of a uniform rule as regards the disposal of appeals when Judges are equally divided. There are 4 different rules adopted in India in this matter.

(i) That enacted by the Civil Procedure Code, S. 98 *viz.*, that the confirming judgment should prevail. This is the practice of the House of Lords (*Paquin Ltd.* v. *Beauclerk* [1]) and seems to be the general rule in the absence of special statutory rules to the contrary. (See 9 P. D. 96).

(ii) That enacted in Art. 36 of the Letters Patent *viz.*, that the opinion of the Senior Judge shall prevail.

(iii) Reference to a third Judge as under S. 98, Civil Procedure Code in which case the opinion of the majority is to prevail (reargument before 3 Judges is the rule adopted with respect to the Court of appeal in England).

(iv) Reference to a third Judge as under S. 429, Criminal Procedure Code, whose opinion is to prevail irrespective of the question whether his opinion is supported by any of his colleagues or not.

So far as the Chartered High Courts are concerned Art. 36 of the Letters Patent prescribes the general rule and must govern all cases unprovided for by special enactments. The Full Bench hold that sanction appeals are one of such cases. The Full Bench also confirm the opinion of the prior Full Bench in *Muthusami Mudali* v. *Veenichetty* [2] that confirming a sanction is equivalent to granting one. A necessary implication of the judgment of the Full Bench would seem to be the correctness of the rule laid down by the referring Bench that Art. 154 does not apply to sanction appeals.

Bapu *v.* Bapu : I. L. R. 39 M. 768. (F. B.)

The judgment of the Full Bench proceeds on the view that legal evidence is necessary before an order for sanction can be made. This is in conformity with the opinion of the Full Bench in *Queen Empress* v. *Sheik Beary* [3]. This legal evidence that

1. (1906) A. C. 148. 2. (1907) I. L. R. 30 M. 332.
3. (1886) I. L. R. 10 M. 232.

is required is not for conviction but for granting sanction for prosecution. Much of the confusion is due to forgetting this essential fact. The grant of sanction being a judicial act, and subject to appeal, the Court can act only on evidence which is legal and which can be examined by the Appellate Court, but the evidence that may induce the granting of sanction is not necessarily evidence relevant in the trial of the case. However, since reasonable probability of conviction is one of the essentials for the granting of sanction reasonable certainty of the existence of the materials for such conviction is also essential and as the court can have cognisance of such materials ordinarily only by having them before it, it follows that, ordinarily speaking, there must be legal evidence for conviction before sanction can be given. But probability of such materials is not on element which can be ignored.

Re Abibulla Ravuthan: I. L. R. 39 M. 770.

That gaps in prosecution evidence cannot be filled up by the examination of the accused has been repeatedly laid down, nevertheless the practice does not die out. The fault lies in the system and not in the individual Magistrate or Judge. The judicial and the executive functions are so mixed up in this country that an attitude of mind is gradually developed with which it becomes very difficult to view the situation from the proper judicial standpoint.

Raja Venkatappa Nayanim Bahadur *v.* Renga Rao: I. L. R. 39 M. 772.

We think that Courts have already proceeded too far in recognising the senior widow's right to adopt so as to divest the junior widow's estate without her consent and it is decidedly against the policy of the law as developed in the decisions to recognise the junior widow's right also to similarly divest the senior widow's estate. Even in the case of the senior widow, it is a question worth consideration whether the right should be recognised when the widows are divided; it should not be impossible to hold at least that in those circumstances the junior widow should be consulted.

NOTES OF INDIAN CASES.

Achratlal Jekisandas *v.* Chimanlal Parbhudas: I. L. R 40 B. 600.

While it may be admitted that the decision of the Privy Council in *Annie Besant* v. *Narayaniah* [1], does not *decide* that the Guardian and Wards Act excludes a regular suit in respect of matters provided for therein, there can be little doubt that the reasoning in that judgment is inconsistent with the view that such matters can be litigated by way of an ordinary suit *inter partes*. If, as their Lordships hold, the question of a father's right to revoke an arrangement made by him for the guardianship of his minor children and resume custody of them "could only be decided by a court exercising the jurisdiction of the Crown over infants and in their presence" because it is a matter 'to be determined, having regard to the interests and welfare of the infant', the same consideration would equally govern any other question relating to guardianship of infants; and it cannot be said that every court in which an ordinary suit may be instituted (subject to the rules of the processual law), such as a Munsif's Court, can claim to exercise the jurisdiction of the Crown over infants. The decision in *Sharifa* v. *Munekhan* [2], can scarcely be looked upon as authoritative. The learned judges merely follow a precedent in their own court; Chandavarkar, J. is evidently not without doubts as to the correctness of the view and Jenkins, C. J. refrains from referring the question to a Full Bench only in the hope that 'at no distant date' the legislature would 'explicitly' substitute the procedure under the Act for an ordinary suit.

When however we come to S. 25 of the Act, other difficulties arise. The literal construction of the section would seem to justify the view taken in the case under notice that it cannot apply to a case in which the ward has not at one time been in the custody of the guardian and then 'leaves' or 'is removed from' such custody. It may with reason be urged that so far at any rate as cases not provided for in the Act are concerned, the Act cannot be held to exclude the remedy by way of suit; but the Allahabad High Court in *Utma Kuar* v. *Bhagwanta Kuar* [3], preferred to strain the language of S. 25 so as to make it cover a case of the kind above referred to.

1. (1914) I.L. R. 38 M. 807. 2. (1900) I. L. R. 25 B. 574.
3. (1915) I. L. R. 37 A. 515.

The *ratio decidendi* of that decision will however apply only to those cases in which a guardian has been appointed *by the Court*, for the learned Judges lay stress on the minor having 'become a ward of the Court in consequence of such appointment'. Part of the reasoning in this judgment did not commend itself to the learned Judges of the Madras High Court who decided *Ibrahim Nachi* v. *Ibrahim Sahib* [1], but in the result they were prepared to strain the language of the section even further, there being not even an appointment by the Court in the Madras case. The reasoning of their Lordships that it could not have been the intention of the Legislature to drive the guardian to a regular suit in such cases is entitled to respectful consideration, but it would certainly be better if, fulfilling the hope expressed by Sir Lawrence Jenkins more than 15 years ago, the Legislature would intervene to put some of these questions beyond doubt.

Madhavrao *v.* Anusuyabai : I. L. R. 40 B. 606.

The Indian law, partly on account of the peculiarities of its customary tenures and partly as a result of its attempt to avoid the theory of successive life estates, has carried very far indeed the separation between the formal conception of a 'continuity of estate' between successive holders and the actual extent of the powers of each holder. It has now become well established that the circumstance that the holder for the time being cannot alienate or incur liabilities so as to bind his successor or even that the successor cannot claim to inherit as of right but only come in with the approval or by order of government or some such controlling authority does not prevent the application to such cases of the rule of 'representation' or 'continuity of estate' as between different holders, for purposes of the rules of *res judicata* and limitation. And as a result of this view, it is equally well settled, anomalous as it may seem, that though a person could not alienate a property so as to bind his successor, the successor may be bound by the consequence of the *laches* of his predecessor, on account of the operation of the statute of limitation. The present case is but an application of these rules to Saranjam estates.

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1. (1915) I. L. R. 39 M, 608.

Bai Diwali *v.* Umedbhai Bhulabhai: I. L. R. 40 B. 614.

We are unable to follow the decision on the question of limitation in this case. A registered usufructuary mortgage provided that after possession by the mortgagee for 11 years, the mortgage amount should be paid to him whenever he should demand it, either out of the property or by the mortgagor or his heirs personally. The mortgagee did take possession, but as a matter of *law* the mortgage was bad as opposed to the provisions of the Bombay Bhagdari Act. After the expiry of the 11 years and before the lapse of 6 years from that date, a person standing in the shoes of the mortgagee sued to recover the money. The learned Judges hold that 'the consideration or part of the consideration being unlawful, the mortgage deed was void and the agreement contained in the mortgage to pay the mortgage debt was void.' The result, according to them, was that the mortgagee was only entitled to a claim for money had and received (under Art. 62), as on a failure of consideration *ab initio.* The learned judges seem to us to have misapplied S. 24 of the Contract Act; we are unable to agree that the covenant to repay was void and that the case was really one of failure of consideration.

It is a well established rule that 'a lawful promise made for a lawful consideration is not invalid by reason only of an unlawful promise being made at the same time for the same consideration," Pollock's Principles of Contract, 8 Edn., p. 384; *Bank of Australasia* v. *Breillat* [1]. The Bhagdari Act merely declares that an alienation of an unrecognised subdivision of a *bhag* shall be void. It does not prevent the owner of such an interest from entering into personal covenants, nor does it make such alienation 'illegal' (as distinguished from 'void') so as to taint even collateral agreements. We do not see why the unenforceability of the mortgage as such should make the covenant to pay also void. Take the familiar instance of a mortgage turning out invalid for want of registration or attestation as required by law; it has nearly always been held that in spite of the failure of the stipulated arrangement to that extent, the personal covenant to pay does not cease to be operative or enforceable. How does the present case stand on a worse footing? In this connection there is this distinction to be borne in mind between a sale and a mortgage. In a mortgage the debt is the primary thing and the security is

1; (1847) 6 Moo, P.C. 152.

only accessory thereto, so that it is impossible to regard the failure of the security as affecting the existence or enforceability of the debt and no question of failure of consideration properly so called arises; but in the case of a sale, if the transfer proves inoperative there is nothing else left of the contract and hence the purchaser, if he had paid the sale price, is entitled to recover as on a failure of consideration. We may point out in passing, that even if there was a case of failure of consideration in the decision under notice, it was not a failure '*ab initio*'; for the mortgagee appears to have got into possession in pursuance of the mortgage and so long as it lasted—whether the mortgage itself was lawful or not—there cannot be said to be a failure of consideration. See for instance, *Narsing* v. *Pachu* [1], *Rajagopalan* v. *Somasundaram* [2].

As for the decision in *Javerbhai* v. *Gordhan Narsi* [3], it seems to us to tell against the view taken in the present case. It no doubt lays down that the mortgage *qua* mortgage is bad and the claim for possession on foot of it cannot be enforced but far from holding that other covenants in the document are void, the learned judges there give relief on the basis of an express covenant in the deed for compensation in the event of hindrance to or deprivation of possession. And it is worthy of note in this connection that in reversing the decision of the lower court on the question of limitation, they clearly make the distinction between the claim on the covenant and a mere claim on the footing of failure of consideration. We have for other reasons doubted the correctness of the decision in that case (see 29 M. L. J. Notes of Ind. Cases, p. 44) but the reasons there given for holding that there is nothing in the Bhagdari Act to make the personal covenant in the mortgage deed unenforceable seem to us convincing.

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1. (1913) I. L. R. 37 B. 538. 2. (1906) I. L. R. 30 M. 316.
3. (1914) I. L. R. 39 B. 358.

NOTES OF INDIAN CASES.

Krishna Chettiar *v.* Nagamani Ammal: I. L. R. 39 M. 915.

We wish the judgment were more clear as to the exact basis on which the minor's estate was in this case made liable. If it is on the basis of the note, then we must confess that there are great difficulties in accepting the judgment as sound. A whole series of cases beginning with *Waghela Rasanji* v. *Sheikh Masludin* [1], see *Indur Chunder Singh* v. *Radhakhishone Ghose* [2], *Soundaram Ayyar* v. *Sennai Nicken* [3], *Surendra Nath Sarkar* v. *Atul Chandra Roy* [4], *Bhawalsahu* v. *Raijnath Pertab Narain Singh* [5], *Duraisamia Reddi* v. *Muthial Reddi* [6], *Sanker Krishna Murthi* v. *The Bank of Burma* [7], *Mirsarrworan* v. *Fakrudin Mahomad Chowdri* [8], (even *Subramani Ayar* v. *Arumuga Chetty* [9], seems to assume that the general rule is that) lay down that a guardian cannot impose a personal liability on the minor and if the note is to be treated as an undertaking merely to pay out of the minor's estate, that would strike at the *note* detracting from the "unconditional nature of the undertaking." A guardian can only deal with the estate. As pointed out in *Indur Chunder Singh* v. *Radhakrishna Ghose* [2], *Hanuman Prasad Panday* v. *Mussamat Baboru Murraj Koonwarji*[10], was the case of a mortgage by a guardian.

The alternative course which is referred to in *Bhawal Sahu* v. *Baijinath Pertab Narain Singh* [5], of allowing the creditor to be subrogated to the right of indemnity possessed by the guardian which is not noticed by the learned Judges steers clear of the difficulties presented by the above cases but it is a question whether the Indian procedure permits of such a course. In *Sanker Krishnamurthi* v. *The Bank of Burma,* [7] Wallis and Munro, JJ., were not prepared to go as far, limiting the rights of the trade creditors to a right of recourse only to the assets embarked in the trade. That course has its justification in the analogies drawn from executor's cases. Persons who have advanced money to the executor are not entitled to proceed against the estate (see *Debendra* v. *Hemachendra* [11].)

1. (1887) I. L. R. 11 B. 551. (P. C.)
2. (1892) I. L. R 19 C. 507.
3. (1900) I. L. R. 28 M. 547.
4. (1907) I. L. R. 34 C. 892.
5. (1907) I. L. R. 35 C. 320.
6. (1908) I L. R. 31 M. 458.
7. (1911) I. L. R. 35 M. 692.
8. (1911) I. L. R. 39 C. 232 (P. C.)
9. (1902) I. L R. 26 M. 330.
10. (1856) 6 M. I. A. 393.
11. (1908) I. L. R. 31 C. 253.

No doubt there are certain authorities that hold that a widow's or manager's bond can be enforced against the estate applying the principles of Hanuman Prasad Pandey. There are also certain but more doubtful cases which apply the same rule to a trustee's bond. That there is no justification for such an extension in English precedents is perfectly clear. It will be found on examination of the manager's cases that they are all based on the doctrine of subrogation to the right of indemnity but it is certainly more than doubtful if the law can be said to be sufficiently logical to admit of the extension of the rule to guardian's cases. The case of *Subramania Iyer* v. *Arumuga Chetty* [1] which their Lordships purport to follow seems to base the minor's liability not on the note as such but on it as an acknowledgment of a pre-existing liability.

Jagapathy Raju *v.* **Sadrusannama Arad**: I.L.R. 39 M. 795.

This case lays down certain principles applicable to suits under Ss. 69 and 70 of the Contract Act which are very essential but which are so often forgotten;

(i) That S. 69 can apply only where the deft. is personally liable to make the payment.

(ii) That neither S. 69 nor S. 70 can justify the imposing of a higher obligation on the deft. than he was originally under; for instance it could not impose on a person a personal liability for the discharge of an obligation which could be enforced only against specific property.

(iii) That neither of these sections can apply where the plaintiff himself is under an obligation to make the payment.

There is much in reason to support the conclusion of the learned judges that the section cannot apply to cases of contribution. This view may lead to considerable hardship in Bengal where a different view prevails from that taken in *Raja of Vizianagaram* v. *Raja Setrucherla* [2].

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1. (1902) I. L. R. 26 M. 330. 2. (1903) I. L. R. 26 M. 686.

NOTES OF INDIAN CASES.

Secretary of State for India v. Rangasawmy Iyengar : I. L. R. 39 M. 831 (F. B.)

So far back as 1847, in a case governed by the Mitakshara Law, the Privy Council decided that the interest of a member of an undivided Hindu family is liable to confiscation for absconding *Musst. Gulab Kunwar* v. *The Collector of Benares* [1] and seeing that Courts have even in other directions travelled very far from the position that that interest is not property (assuming that that position was at any time true), the only possible conclusion was the one arrived at in this case. But it does not appear that *Juggomohun Bukshee* v. *Roy Mothoornath Chowdry* [2] was a Mitakshara case; on the other hand, judging from the names of the parties and the district from which the case came, we should think the parties were governed by the Dayabhaga Law. As rightly pointed out by the Full Bench, the position that the interest of the undivided member is attachable does not involve, any more than the fact that it is attachable in execution of decrees, the recognition of any right to interfere with the rights of the other members. Just as attachment in execution severs the interest of the judgment debtor, *Madho Pershad* v. *Mehraban Singh* [3] attachment in this case also may sever the interest of the absconding member.

Subrahmania Aiyar v. Sellammal : I. L. R. 39 M. 843.

We must confess we are not quite convinced that *Dalgleish* v. *Damodar Narain Chowdhry* [4] was wrongly decided though *Moideen Hadjiar* v. *Pitchey* [5] is for the reasons stated, not an authority on the Section of the code as it stands. In the first place, one does not see why the value of the subject-matter of a suit must be determined as at the date of the institution of the suit rather than as at the date of the decree. In the second place, the claim with respect to mesne profits is not quite on the same footing as the claim for interest. The claim for interest forms an integral portion of the claim for money but its award is wholly in the discretion of the Court. Not so, however, mesne profits. They form a *distinct claim* and are not, at any rate under the new code, in the discretion of the court. Even under the old code, the discretion

1. (1847) 4 M. I. A. 246.
2. (1867) 11 M. I. A. 223.
3. (1890) I. L. R. 18 Cal. 157 P. C.
4. (1906) I. L. R. 33 C. 1286.
5. L. R. (1893) A. C. 193.

was only as to whether the court should in the action for possession itself, award mesne profits or leave the party to a fresh suit ; it could not in its discretion disallow the claim. Though under the old code there might have been situations in which they might not be regarded as part of the subject-matter of the suit, (being so only at the discretion of the court), under the new code, they would distinctly be so—not subject-matter at the date of the suit for the obvious reason that there was no cause of action at the time, but becoming such during the course of the suit, as and when they accrue due. Any other view is likely to lead to anomalies.

This aspect of the case could be enforced by a reference to the state of affairs under the old Code. It was clearly optional with the party to press his claim for future mesne profits (we do not concede that the new Code has made a difference but there are some cases which have taken that view). Suppose he got a decree for possession and did not press for a decree for mesne profits but sued separately for them. Could it have been contended in those circumstances that the decree for possession did not involve indirectly a claim to the mesne profits. Take again a case under the new code where a preliminary decree for possession is made and an appeal is filed therefrom. Clearly the preliminary decree involves a claim to mesne profits. It would be in the highest decree anomalous that the mode of prosecuting or dealing with a claim should affect the right of appeal.

Vijaya Ramayya *v.* **Venkatasubba Rao:** I. L. R. 39 M. 853.

An agreement to refer to arbitration is undoubtedly "an agreement with reference to the suit" and would be voidable at the instance of the minor if entered into by the *guardian ad litem* without leave of the court but it is an altogether different question whether apart from proof of gross negligence or fraud of the *guardian ad litem*, the fact that the guardian ad litem has not agreed to the reference, or that he has not obtained leave of the court is a ground on which the award passed in pursuance of the reference can be collaterally impeached in a suit. A reference outside court though in respect of a pending suit, when an award follows, may be viewed as an adjustment for the purpose of being recorded under order 23, r. 3 but it would seem hardly legitimate to so regard the award when it has been passed in pursuance of

the order of the court on the basis of the agreement of reference and a decree has also followed. There cannot be any pretence that an adult party to a suit can set aside an award on the ground that he was not a party to the reference when he has not chosen to put forward the objection in time before the court. It is difficult to see how a minor's case differs. If the award is sought to be put in only as an adjustment, it may well be the minor, may take the objection in a separate suit. But assuming that the minor, could take the objection it is perfectly clear that the fact that the reference is beneficial to the minor does not signify *Subrahmaniam Chettiar* v. *Rajarajeshwara Dorai* [1] and also that the old suit must be proceeded with from the stage at which the reference interrupted its further progress *Khajooroonissa* v. *Rowshan Jehan* [2].

In this case their Lordships hold that the previous suit being one for partition, the whole suit would have to be re-opened. But is this consistent with *Jamna Bai* v. *Vasanta Rao* [3] ?

Dharmaraja Ayyar *v.* Srinivasa Mudaliar : I. L. R. 39 M. 876.

An application to extend the time for payment of the mortgage amount is an application in a pending suit and as it does not relate to execution no appeal lies from an order extending the time. And order to that effect can however be made only by the first Court and not by the Appellate Court which passed the preliminary decree though it is open to the Appellate Court while making its own decree to provide for a fresh period for payment. It has been uniformly held that S. 148, Civil Procedure Code, has no application to cases where a period is fixed by the decree for the payment of money made payable thereunder.

Velayutham *v.* Subbaroya : I. L. R. 39 M. 879.

We feel some difficulty in accepting the judgment in this case as correct. If the case were an ordinary one under Art. 141 or 144, there is no denying there is considerable force in the reasons given for holding that the plaintiff was not barred. But here the case being one under Art. 134, the question of adverse possession or otherwise did not matter and there was also difficulty in applying the presumption that the possession of one co-owner is the possession of the others as well to the case as the

1. (1916) I. L. R. 39 M. 115 (P.C.) 2. (1877) I. L. R. 2 C. 184.
3. (1916) I. L. R. 39 M. 409. (P. C.)

co-owner in question was a mortgagee and so far as his actual possession was concerned, it could not be for his co-owners. The rule in question is not a rule imposing a disqualification but only raises a presumption. It is open to a co-owner to enter upon land adversely to his co-owners as well as during possession to set up adverse right. Equally it must be that if on the facts it is impossible to raise the presumption in a particular case; there is no compelling rule that the presumption should be raised. Even in cases governed by Art. 144 it must be noted that the mere fact that possession ceases to be adverse will not do in the absence of acknowledgment of title with the formalities required by S. 19 or a notional restitution of possession analogous to the case of sudden submergence of land or a fresh and independent cause of action. If the present case were one governed by Art. 148 uncomplicated by Art. 134 and more than 60 years had elapsed from the date fixed for redemption, there could be no pretence that the fact of co-ownership would have saved the plaintiff's right to redeem; it is difficult to see how a different rule can be applied to Art 134. In *Soni Ram's case* [1] during part of the limitation period (that was a case under Art. 148) the mortgagee was in possession as vendee from the widow and it was argued for the reversioner that during that period, the mortgagee was in possession rightfully and could not be redeemed and therefore he had a fresh cause of action to redeem on the death of the widow or that he was entitled to deduct the period during which the mortgagee was in possession as such vendee. Their Lordships refused to give effect to the contention pointing out the incompatibility of the rule of suspension with the Indian Limitation Act.

But another question. In this case there was a decree against the mortgagee in favour of the reversioner that he was entitled to redeem after the death of the Widow. The frame of the decree was no doubt anomalous but would it on that account be any the less *res judicata* against the defendant who claimed *through the mortgagee*. The rule of *res judicata* the Privy Council has held in *Harinath Chatterjee* v. *Mothurmohun Goswami*, [2] is not affected by the change in the rule of limitation. That was a decision in favour of the person in adverse possession and against the reversioner, and why should a different rule obtain *against* the person in adverse possession ?

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1. (1918) I. L. R. 35 A. 227. (P. C.) 2. (1893) I. L. R. 21 C. 8.

NOTES OF INDIAN CASES.

Errikulappa Chetty *v.* **The Official Assignee**: I. L. R. 39 M. 903.

The conclusion in this case is right. But for S. 53 of the Presidency Insolvency Act (corresponding to S. 34 of the Provincial Insolvency Act) short of a payment order, the creditor should lose his remedy in execution against any portion of the judgment-debtors' assets. In this case there was no question of realisation of assets in execution, the only question being whether the creditor had become a secured creditor. It would be anomalous as pointed out by their Lordships that a creditor who would not be entitled to any preference if he had attached before judgment should have such preference in respect of a security given for the production of goods *to be* attached.

Ramdas Vithaldas Durbar *v.* **Amerchand and Co**: I. L. R. 40 B. 630 (P. C.)

Commenting upon the decision of the High Court in this case, we pointed out that while the conclusion was unexceptionable, the ground of decision was not satisfactory (27 M. L. J., Notes 55). We are glad to find that the Privy Council have put the matter on the sounder ground that the applicability of Ss. 102 and 103 of the Contract Act to the transfer of any particular document must be decided with reference to the usage obtaining in the ordinary course of business in connection with such a document. Their Lordships practically recognise that the Contract Act in this respect laid down the law in wider terms than the rule then obtaining in England, anticipating the change effected by the Factors' Act of 1877. The decision in *G. I. P. Railway* v. *Hanmandas*, [1] must now be taken as definitely overruled. The possibility of a distinction suggested by Sargent, C. J. between the definition of 'documents showing title to goods' for the purpose of S. 102 and that for the purpose of S. 108 is clearly negatived by their Lordships. The question of the effect of the enumeration in Sec. 137 of the Transfer of Property Act, apart from commercial usage in respect of any particular document, is left open.

1. (1889) I. L. R. 14 Bom. 57.

Ismail Allarakhia *v.* **Dattatraya R. Grandhi**: I. L. R. 40 B. 638.

We have little doubt as to the correctness of the conclusion arrived at by the Appellate Court in this case but it seems to us that the decision might well have been rested on a broader ground than that actually taken. A, the holder of what purports to be a mortgage by B of properties belonging to B, assigns the mortgage to C for valuable consideration. Both A and C believe at the time that the mortgage had really been executed by B but it is afterwards found that the executant was a brother of B who had personated B, himself having no interest in the mortgaged property. On discovering this, C sued A to recover the money paid by him for the assignment, on the footing of a failure of consideration. Macleod, J. in the first instance dismissed the claim applying the rule of 'caveat emptor.' On appeal the learned Judges avoided deciding the general question thus raised and preferred to base their judgment on the following special facts. At the time of the assignment, C had insisted that the mortgagor should be a party to the assignment to concur in the transfer and this was complied with by the brother once again personating the nominal mortgagor. The learned Judges say that the assignment not having been executed in the manner contemplated by the parties, that is, by the participation of the person therein described as the mortgagor, the case must be dealt with as one of a claim made *before* completion of the contract by conveyance and applying Ss. 20 and 65 of the Contract Act they held that A was bound to repay the transfer money. We venture to doubt if the learned Judges are not straining the facts to bring the case within the rule in *Johnson* v. *Johnson,* [1] and avoid deciding the larger question.

The principle of *Johnson* v. *Johnson* [1], as well as of the passages quoted by the learned Judges from Sugden and Dart is, that the right of the buyer to claim repayment of the purchase money on the ground of want of title in the vendor ceases with the execution of the conveyance and that thereafter his remedies are governed by the covenants in the conveyance. The question will be found discussed at some length in the judgment of Malins, V. C. in *Allen* v. *Richardson,* [2] and of Justice Grove in *Clare* v. *Lamb* [3]. In the latter case it was laid down to be the "general

1. (1802) 3 B. & P. 162. 2. (1879) L. R. 13 Ch. D. 524.
3. (1875) L. R. 10 C. P. 334.

doctrine" that the rule of *caveat emptor* applies to all completed sales, in the absence of a covenant for title, and in the former, the rule of the English law was stated to be, " that when a man sells a property it should be the duty of the purchaser to investigate the title and he must do so and satisfy himself before completion."

We are not quite satisfied that the learned Judges of the Bombay High Court are right in holding that the omission of the mortgagor to join in the assignment for the purpose of "confirming the covenants in the mortgage deed," or assenting to the transfer of the mortgage amounts to a 'non-completion' of the conveyance as between transferor and transferee, so as to bring the case within the above rule. If the learned Judges were prepared to hold that in the case before them there was a mutual mistake, "as to a matter of fact essential to the agreement," we do not think it was necessary for them to endeavour to bring the case under the rule in *Johnson* v. *Johnson* [1]. For even under the English law the better view would seem to be that where there is a common mistake of *fact* as to title, the purchaser may recover his money even *after* the contract had been completed (see Dart's Vendor and Purchaser, 7th Edition, p. 161. *Jones* v. *Clifford* [2].) But as suggested at the outset we venture to think that the case might well have been decided on the ground that the rule of *caveat emptor* has no application in India to such cases and that the plaintiff was entitled to succeed on the covenant implied by S. 55 (2) of the Transfer of Property Act. It is scarcely necessary to point out that the requirement of the English common law of an express covenant for title does not hold good in India and cases like *Bree* v. *Holbeck*, [3] and *Cripps* v. *Reade*, [4] are no safe guides in this country. As to *Clare* v. *Lamb*, [5] the ground on which *Hitchcock* v. *Giddings*, [6] is there distinguished suggests that once the sale is complete the purchaser cannot claim to get back his money even if the property sold had as a matter of fact, ceased to exist at the time of the sale, both parties being ignorant of that fact. This is certainly not the law in India. We cannot follow Macleod, J., when he says that the case now under discussion

1. (1802) 3 B & P. 162.
2. (1876) L. R. 3 Ch. D. 779.
3. (1781) 2 Doug. 654 a.
4. (1796) 6 Term. R. 606.
5. (1875) L. R. 10 C P 359.
6. (1817) 4 Price 135.

was not one of sale. If it can be regarded as a case of sale for the purposes of applying either the rule in *Bree* v. *Holbeck*, [1] or that in *Johnson* v. *Johnson*, [2] we do not see any difficulty in viewing it as a sale for the purpose of S. 55 of the Transfer of Property Act; for even under the English law the rule of *caveat emptor* was not applicable to all transactions. (See *Cripps* v. *Reade* [3] where Kenyon, C. J. excludes a mortgage from that rule).

Tangya Fala *v.* Trimbak Daga : I. L. R. 40 B. 646.

On the question of subrogation raised in this case, the Judgment of Batchelor, J. seems to us somewhat too broadly expressed, but on the facts appearing from Justice Shah's Judgment there can be no question as to the correctness of the decision. The original mortgage comprised several items, two of which alone were purchased by a stranger in execution of a money decree against the mortgagor. Nearly two years after this purchase the mortgage decree is put in execution and the mortgagor borrowed money from the present plaintiff to pay off the amount of that decree. The question was whether in consequence of such payment the plaintiff acquired a charge on the items already purchased by the defendant in execution of the personal decree. As pointed out by Shah J., the mortgagor by himself paying the whole amount of the mortgage could have a charge on the items purchased by the defendant and as a person owning the other items he was clearly interested in arranging for the discharge of the mortgage. But if Batchelor, J's. judgment is meant to imply that even in cases in which *all* the items comprised in the mortgage have been purchased by a stranger, the mortgagor could by borrowing from a stranger to pay off the mortgage debt enable such stranger to acquire a charge over the properties in the hands of the purchaser, the proposition seems to us open to doubt. In the case supposed the mortgagor may still be interested in paying off the mortgage debt because of his continuing personal liability. But we are not sure that that circumstance will suffice to entitle the third party advancing moneys to him for that purpose to claim the benefit of the rule of subrogation; we must however admit that *Butler* v. *Rice* [4] goes even further.

1. (1781) 2 Doug. (K. B.) 654. 2. (1802) 3 Bos. & P. 162.
3. (1876) 6 Term. R. 606. 4. (1910) L. R. 2 Ch. 277.

Kahsibai *v.* Tatya: 40 B. 668.

This case differs from the familiar type of ante-adoption agreement cases in that the adopted son was *sui juris* at the time of the adoption and no question therefore arose of the natural father's power to represent him or the reasonableness of the arrangement. One peculiar circumstance in the case however is that under the arrangement no properties were secured to the adopting widow herself but, by a will executed by the widow simultaneously with the adoption, certain items were devised to her granddaughter, this will being attested by the adopted son. In the deed of adoption the properties of the husband other than those comprised in the will were alone mentioned as devolving on the adopted son. The learned Judges look upon the whole transaction as a family arrangement and treat the widow's will not as operative by itself but as merely evidentiary of the family arrangement. The decision is certainly equitable but we are not sure that the case is free from difficulties of legal theory.

The omission of the disputed items from the deed of adoption will not of itself suffice to prevent their vesting in the adopted son as a *legal consequence* of the adoption. It cannot be said that these items continued to vest in the widow, for there was no such arrangement or reservation; nor can it be held that they immediately vested in the grand-daughter, because, in view of the will of the widow, whether treated as the root of title or as merely evidentiary, the grand-daughter cannot claim them during the widow's life time. The result therefore is that they must be held to have vested *by law* in the adopted son; and it is, to say the least, singular to allow properties so vested in the adopted son to be divested *in futuro* by the widow's will. It is this anomaly that the learned Judges seek to get over by basing the grand-daughter's title not on the will but on the family arrangement. This is obviously straining the position. Suppose the widow chooses to revoke the will; can it still be contended that the grand-daughter will nevertheless be entitled to the properties? Or, can it reasonably be suggested that though the widow, for reasons best known to herself, chose to make only a will, she has some how lost the power of revoking it because the adopted son has consented to it or the Court chooses to call it a family arrangement?

Kashinath v. Dhondshet, I. L. R. 40 B. 675.

Even if one should give full effect to the decision of the Madras High Court in *Rajah of Vizianagaram* v. *Dantivada Chelliah*,[1] the present case is distinguishable and the learned Judges have, if we may say so, come to the right conclusion. See *Rama Pal* v. *Prakash Chandra* [2]. A judgment debtor, after allowing certain lands to be sold in execution of a decree against him, brings a suit to recover possession of the same from the purchaser on the ground that being occupancy lands they could not legally be sold. The first step in this claim was to show that they were 'occupancy lands;' and as the learned Judges say, this objection ought to have been taken when it was sought to bring the lands to sale. It is a matter for consideration whether the general prohibition in O. 21, R. 92, (3) debarring a suit to set aside an order confirming a sale will not of itself cover a case like the present; but the learned judges have not dealt with the matter from this point of view. In the Madras case, when the question was raised in the course of execution, it was somehow *admitted* that the lands in question were 'Service Inam lands' and hence their unsaleability was hold to follow as a necessary consequence, in spite of the decree for sale. Whether even on this footing, that decision is not open to question, we need not discuss here.

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1. (1904) I. L. R. 28 M. 84. 2. (1916) 32 I. C. 757.

NOTES OF INDIAN CASES.

Krishnan Kidavu v. Raman : I. L. R. 39 M. 918.

Appointment of an agent with however wide powers cannot preclude the principal from acting in the matter and the renewal taken by the principal in this case was properly held binding on the tarwad though in a proper case, as a part of a family arrangement, the karnavan may agree not to act except through as agent appointed by the family conjointly as a result of which his own act might not bind the tarwad. Delegation in the sense of appointing an acting Karnavan with all its implications, guardianship and personal control, discretion in the distribution of family income and non-accountability must in the nature of things be impossible whether to a stranger or to a member of the family. An acting Karnavan called a *de facto* manager coming in by his right as the next junior by reason of the non-exercise of his rights by the Karnavan *de jure* (not amounting to an absolute renunciation by the latter) is assumed in many cases to be a possibility though the rights and duties of such a *de facto* Karnavan have not been accurately delimited. The rest is agency pure and simple which does not take away the rights of interference by the karnavan and cannot extend to his rights and duties as karnavan. Appointment of an agent is an act permitted to him just as the appointment of a servant is. If he purports to confer upon the agent powers he cannot confer, though ineffectual to clothe the agent with the powers and immunities of his principal it may nevertheless be an improper act that may go against him in a suit for his removal from the karnavanship.

Vyaravan Chetty v. Srimath Deiva Sikamani Nataraja Desikar: I. L. R. 39 M. 939.

There is an impression abroad that equitable set-offs are exempt from all rules of limitation. Their Lordships have, we think, accurately indicated the limits of the exemption. The exemption properly applies wherever the question is one of deduction, appropriation or defence or arises as a part of a general account in a case of accountable relationship. In other cases, equity follows the law.

Chanton v. Mathee : I. L. R. 39 M. 957.

While having regard to the sanction by which non-compliance with the direction to pay maintenannce is enforced, we should think too liberal a construction of the section is to be deprecated, the construction suggested or rather which the words used in the Judgment suggest though not the actual decision goes too far. We think that the section must apply to all cases in which the child is *in fact* unable to maintain itself. That charitably inclined persons may most probably feed the child cannot obviously be a ground for disallowing maintenance. Nor again the right to proceed against certain property be properly considered a ground for dis allowing it. A legal right cannot feed a child. The test ought to be, we think, actual possession of the means necessary; at least the means ought to be readily available.

Subbiah v. Rama Reddi ; I. L. R. 39 M. 959.

Their Lordships rightly held in this case that the covenants of the mortgagor to pay the public charges on the land cannot bind person who has acquired the equity of redemption by adverse possession. The confusion comes from the failure to realise the simple fact that S. 28 of the Limitation Act does not confer rights but only extinguishes them. The rule that possessory title is good against the whole world except the true owner operates in effect to make the position of the person in possession as secure as that of the true owner whose rights are extinguished but the true legal theory should not be forgotten lest one should apply all the implications of a conveyance in fact to the "*Statutory conveyance*" under this section.

Singa Reddi v. Subba Reddi : I. L. R. 39 M. 987 (F. B.)

The curious result of *Atchuta Menon* v. *Atchutan Nair* [1] was to make the penalty for withdrawal more far-reaching than for a dismissal of the suit on the merits. We think the Full Bench did right in overruling 21 Mad. 35.

1. (1897) I. L. R. 21 M. 35.

NOTES OF INDIAN CASES.

Sivasubrahmanya *v.* Subrahmanya Ayyar: I.L.R. 39 M. 997.

The decision in *Abdulla Beari* v. *Mammali Beari* [1] was decided at a time when the view that prevailed with reference to provisions for payment of purchase money to third parties was that the vendor's only right was to be indemnified in the event of loss. In that view, the facts in *Abdulla Beari* v. *Mammali Beari* [2] would bring the case within the class of transfers indicated by the Privy Council in *Webb* v. *Macpherson* [2] as not giving rise to the Vendor's lien, *viz.*, transfers in consideration of a covenant to pay. But that is not the view now held and the case is rightly overruled.

Nachimuthu Chetti *v.* Muthusami Chetty: I.L R. 39 M. 1006.

This case as observed by their Lordships is governed by the reasoning of the Full Bench in *The Sessions Judge of Tinnevelly Division* v. *Sivan Chetty* [3] and is undoubtedly within its mischief.

Nanda Lal Roy *v.* Abdul Aziz. I. L. R. 43 C. 1052.

The point for decision in this case arose under S. 78 of the Transfer of Property Act, in connection with the competing claims of (i) a vendor who had been given a mortgage on the property for the balance of his purchase money and (ii) a subsequent mortgagee from the vendee who had advanced moneys without notice of the prior charge and on the strength of the possession of the property and the title-deeds by the vendee.

For one reason or another, it is quite common in this country to find that when two documents are executed on the same day, between the same parties and in respect of the same property, the one avoids all reference to the other. Again recitals as to the passing of consideration are not always so worded as to give a correct idea of what has happened and the system of conveyancing or investigating title is far from well developed or widespread. The result is that more often through recklessness than by any fraudulent intent one party makes it possible for another to perpetrate a fraud on a third and courts of law cannot ignore these habits of the people when they are frequently called upon to decide which of two innocent parties is to suffer for

1. (1910) I. L. R. 33 M. 446. 2. (1904) 31 I. L. R. C. 57 (P. C.)
3. (1909) I. L. R. 32 M. 258. (F. B.)

the result of the fraud. Hence it is that the application of the test of 'gross neglect' to the particular facts of any case is by no means simple and this accounts in some measure for the apparent differences amongst judicial precedents. While every case reiterates that the question is one of 'fact', judges have been so much in the habit of drawing certain inferences, almost as 'necessary inferences', from certain circumstances that some rules almost in the nature of 'legal' presumptions have grown up. One of them arises in connection with 'registration'; on this point some Courts in India hold that the registration of a document is by itself notice thereof to parties subsequently dealing with the property, but the doctrine of notice not being directly referred to in S. 78. Registration or search in the registrar's office is relevant in the present class of cases only as bearing on the general question of "gross neglect" on the part of the prior mortgagee or as disentitling the later mortgagee to any equity on the ground of his own neglect. The omission to secure possession of the title-deeds is generally the basis of the charge of neglect. Comparing the present case with the decision of the Madras High Court in *Rangasami* v. *Annamalai* [1], it will be noticed that in the former the omission to take possession of the title-deeds is given greater importance than in the Madras case, presumably because of the fact indicated by Mr. Justice Imam in the course of the argument, that the suburbs of Calcutta where the transactions in question took place are 'very much affected by the practice prevailing on the original side.' But in *Manindra Chandra* v. *Troyluckho Nath* [2], though it was a case on the original side, Jenkins, J. (as he then was) refused to regard it as gross negligence on the part of a registered mortgagee to leave the title-deeds with the mortgagor.

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1. (1907) I. L. R. 31 M. 7. 2. (1898) 2 C. W. N. 705.

NOTES OF INDIAN CASES.

Ramachandra Bhanj Deo. *v.* Secretary of State for India : I. L. R. 43 C. 1104 (P. C.)

With reference to the remark in this case that the 'High Court was not at liberty to disregard the finding............on the ground that the District Judge gave no reasons for coming to this findirg,' we are constrained to observe that the strong and wide language employed by their Lordships of the Judicial Committee in insisting from time to time upon the limitations imposed by law upon the powers of a court of 'Second appeal,' is likely to encourage a habit, by no means uncommon, in subordinate courts of appeal, of couching their findings of fact in general language, without bestowing on the case the amount of care and attention necessary to record a full and complete Judgment of their own. It is certainly not sufficient that there is evidence in the case to support the conclusion of the lower appellate court; it must also appear that that court had considered it. That is why the code provides that the appellate judgment 'shall state' the points for determination......and the reasons for the decision.' The law makes no distinction between a 'confirming' Judgment and a 'reversing' Judgment. It may no doubt be said, and with reason too, that an appellate, court when it is substantially in agreement with the Judgment of the court of first instance need not repeat the reasons contained in it in its own Judgment. But even this cannot justify the appellate court in expressing its general agreement without indicating clearly that it has applied its own mind to the case. And with all respect to their Lordships, we fail to see why the omission of the appellate court to observe the duty cast upon it by the code in this respect should not be regarded as an 'error or defect in procedure.'

Re Maddela Ramanujamma: I. L. R 39 M. 977.

Although it is difficult to approve of the method adopted in this case of getting rid of the authority of a Full Bench, *viz.*, of counting up the number of judges that are and have been against the

ruling in and out of the Full Bench, we think that it is possible to distinguish the Full Bench decision for we do not think that the word confession is used in the same sense in S. 25 of the Evidence Act and S. 164 of the Cr. P. Code. It is possible, we think, to give a narrower interpretation to that term as used in S. 164 by reference to the nature of the investigation in the course of which or before trial in connection with which, the confession is made. If it is admission of one of the offences forming the subject-matter of the complaint, investigation, inquiry or trial, the statement must be taken to be a confession not otherwise. There is no duty cast on the magistrate to record a confession nor is there any prohibition of the use of a confession not recorded. S. 25 strikes at the use of confessions altogether for whatever purpose however made or recorded. Obviously it has a wider object and the interpretation of the Full Bench is made in deference to this object. Suggestion that when a man is convicted on a charge for making contradictory statements he is not convicted on the basis of the truth of his statement is, we must confess, somewhat unconvincing.

Hakeem Patte Muhammad *v.* **Shaik Davood**: I. L. R. 39 M. 1010.

It may well be doubted if the legislature intended this result. S. 60 purports to apply to all mortgages and saves no contract to the contrary. Some of the subsequent sections also deal with mortgages generally while others deal with specific kinds of mortgages. S. 98 coming at the end of all these provisions provides for certain classes of mortgages which are described as anomalous mortgages and says that the rights and liabilities of the parties in the case of such mortgages are to be determined by the terms of the contract as evidenced in the mortgage deed and on points not covered by the contract, by local usage. The question is whether this section preserves contracts in such mortgages clogging equity of redemption. If the application of S. 60 is excluded by this section, those contracts would be saved. We have grave doubts if anything more was intended by the section than to enact that while the incidents of the mortgages specified, are to be determined by the express pre-

scriptions in the Transfer of Property Act in the case of these mortgages, they are to be determined by the contracter local usage. It could not have been intended for instance, that Ss. 61, 69 or 82 should not govern these mortgages. Having regard to the very unsatisfactory definition of mortgage by conditional sale in the Transfer of Property Act, this construction of S. 98 is full of dangerous possibilities and has carefully to be scrutinised. *Ramayya* v. *Guruva* [2] relied upon do not seem to decide the point. On the facts of the case, we cannot quite see why the document should not have been construed as containing a personal covenant. The language is not dissimilar to that of *Kangaya Kumkal* v. *Kalimuthu Ammayi* [3].

Yella Reddi *v.* Syed Muhamad Ali : I. L. R. 39 M. 1026.

As pointed out by their Lordships, *Vaidyanathasami Iyer* v. *Somasundram Pillai* [4] seems to have been misunderstood in *Ramasami Naicker* v. *Ramasami Chetty* [5]. Moreover, a payment by a party to himself cannot appropriately be called "payment" within the meaning of the section. *The Secretary of State* v. *Fernandez* [6]. Whether apart from provision in the decree, the defendant (mortgagee) could be made to account for the profits is another question and did not arise in the case.

Krishnasami Naidu *v.* Seetha Lakshmi Ammal : I. L. R. 39 M. 1029.

The donors were not bound to maintain the descendants of the illegitimate son and as such the gift could not have been intended for their benefit also.

Subbamma *v.* Subrahmanyam : I. L. R. 39 M. 1035.

The widow having validly exercised her power to alienate for life, any surrender by her subsequently could destroy only her remaining interest and could not affect the alienees. The reversioners take only what remains.

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1. (1906) I. L. R. 30 M. 61.
2. (1890) I. L. R. 14 M. 232.
3. (1903) I. L. R. 27 M. 526. (F. B.
4. (1904) I. L. R. 28 M. 473 (F.B.)
5. (1906) I. L. R. 30 M. 255.
6. (1907) I. L. R. 30 M. 375.

Tiruvengada Konan *v.* **Venkatachala Konan** : I. L. R. 39 M. 1042.

Though this case makes the most plausible suggestion so far made for relieving the situation created by the Full Bench decision as to adverse possession, it can by no means be unhesitatingly affirmed that the use made in it of Order 21 R. 36 is legitimate. The section *prima facie* has reference to occupation by a party entitled to hold it and not a party who is not entitled to hold it or holds it adversely to the plaintiff. Symbolical possession of a right which does not involve the perception of any benefit from the land or from the party in occupation of it (for no action would lie at the instance of the landlord as against the trespasser for rent), is a misnomer.

NOTES OF INDIAN CASES.

Seshagiri Rao *v.* Hanumantha Rao: I. L. R. 39 M. 1031.

The suit being properly constituted as to parties, and there being no provision of law casting upon the plaintiff the duty to amend the pleadings when the defendant comes of age, we think the decision of the learned Judges that the decree was not without jurisdiction is right. We are not quite so certain that if the suit were against a major as a minor even then the proceedings would not have been without jurisdiction. The decision of the Privy Council in *Rashid-un-nissa* v. *Muhammad Ismail Khan*[1] is based on the ground that a minor without a guardian *ad litem* is not properly constituted as a party and is not put on the ground of any tender solicitude of the Courts for minors. Apart from any question of estoppel or acquiescence, we do not see on principle any distinction between the major described as a minor and a minor described as a major. *Ramachari* v. *Dorasami Pillai* [2] was passed at a time when the law as to minors not properly represented was not settled.

On principle some distinction ought also to be made between the ordinary case of a minor coming of age pending a suit or appeal and a case in which an occasion arises for taking notice to him after his attaining majority. In cases where the notice is compulsory, it may be the notice served on the guardian is wholly ineffective but where nothing of the sort is to be done, it is not clear why the decree should not be binding absolutely. When the minor comes of age, it is his duty to take up the conduct of the case and even if the other side is technically guilty of any omission in not amending the record, it is an irregularity which can under no circumstances hurt him.

Michael Pillai *v.* Rt. Rev. Bartle: I. L. R. 39 M. 1056.

Assuming that it is permissible for the founder of a Catholic Church to impose at the time of dedication certain conditions overriding the superior authority and power of the Bishop and the Pope in specified matters, where nothing is known about the terms of dedication except that the edifice was intended to be used as a Catholic Church, the only presumption

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1 (1909) I L. R. 31 A. 572. (P. C.) 2. (1898) I. L. R. 21 M. 167.

that can properly be made, having regard to the Catholic doctrine about the supremacy of the authority of the Pope and the Bishop in matters spiritual as well as in matters relating to the administration of the temporalities of the church, is that usages, whatever they are, and however long, are liable to be superseded by those authorities. It is very much to be doubted if it is proper to regard a donation to the church as a case of dedication; it is more a case of gift to a corporation known as *the church*. There may be legal difficulties in accepting this position in countries where foreign corporations are not recognised or corporations can be created only in specified ways. There are no such difficulties here in India.

Subrahmania Chettiar v. Kadiresan Chettiar: I. L. R. 39 M 1081.

The amendment by the Act of 1908 makes it perfectly clear that the legislature approves of one set of decisions and not the other.

Venugopal Mudali v. Venkatasubbiah Chetty: I. L. R. 39. M. 1196.

If the appellate order had set aside the order of the Lower Court, there could be no question but that it would be an order under O. 21 R. 58. Why should it be otherwise when the appellate order merely confirms the order of the Lower Court? As observed by the Privy Council in *Bassu Kuar* v. *Dhum Singh*[1], it should be "a very inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not." Courts have not always borne this aspect of the case in mind. Happily in this case a solution in accord with the true theory of law was found.

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1. I. L. R. 11 A. 47.

NOTES OF INDIAN CASES.

Radha Kunwar *v.* **Reoti Singh** : I. L. R. 38 A. 488 (P. C.)

Their Lordships' judgment in this case is clear authority for the position that in a suit for sale upon a mortgage, persons claiming adversely to the mortgagor and the mortgagee cannot be made parties. The case their Lordships had to deal with was the simple one of a stranger setting up a hostile title and their Lordships' judgment cannot be taken as authority for the further position that where even the mortgagor's interest has been acquired by adverse possession by a stranger, the latter cannot be made a party. It is also doubtful if the case can be taken as an authority equally applicable to redemption actions though the reasoning would seem to point to its being so. For their Lordships say at p. 493, "The confusion has arisen because the cause of action against the appellant, that is to say, the right to obtain a declaration of title against her adverse claims has been joined with another which was quite distinct, the *enforcement of rights* under a mortgage". A suit for redemption is as much a suit for enforcement of rights under a mortgage as a suit for sale. But such a view specially having regard to the fact that there may be adverse possession both against the mortgagor and the mortgagee, may have disastrous consequences.

The rule will not of course preclude the defence of the mortgagee defendant of his representative, where he is not estopped that the plaintiff had no title to convey and as such is not entitled get possession. We fancy that the mortgagor or his representative also will not be precluded unless some rule of estoppel comes in and prevents him from raising the plea. In fact whether a party is to be precluded from raising a defence, is more a rule of estoppel than of joinder. In appropriate cases, Order 2, R. 4 may be called in aid to relieve the situation. The judgment will not operate as constructive *res judicata* in cases where the plea is precluded as the hostile title will not be a matter which might and ought to have been made a ground of defence or attack. The only safe course for a defendant properly a party who has a hostile title to plead is to plead it lest he should be prevented from relying upon it as against an innocent purchaser in execution, though it could not be gone into in the action. It would be a great hardship to require him to elect between being dismissed rom the action so as to be able to rely on his title and giving up

his title if he wants to oppose the action on the mortgage on a defence appropriate to such an action.

Ahamed Raja v. Abid Husain: I. L. R. 38 A. 494 (P. C.)

The distinction between a recital of a transaction and the record of a transaction is well known; the only difficulty being in determining as to when it is the one and when the other. In this case their Lordships hold that the petition of compromise only recited a mortgage transaction and therefore did not require to be stamped as such. *Prima facie,* a petition must be taken only to recite the transaction and not to record it, at any rate when as in this case, writing was not necesary for the *validity* of the transaction.

Dhanraj Singh v. Lakhrani Kunwar: I. L. R. 38 A. 509.

The final judgment in this case enunciates no novel principle. S. 47 is obviously not a bar to a suit based on a cause of action arising subsequent to the previous suit, in fact after the decree. Not so however the judgment of the single judge against whose judgment it was an appeal. The learned judge holds that a suit can be brought on the decree of an Indian Court directing delivery of possession as against the parties to the decree. If that is the correct law, the situation may, as the appellate judges say, be very alarming. But that conclusion is opposed to the wording of S. 47, C. P. Code and has not been accepted in *Periasami Mudaliar* v. *Seetharama Chettiar* [1] and *Merwanji Nowroji* v. *Ashabai* [2] though where S. 47 does not present a bar, an action can undoubtedly be brought to enforce the obligation imposed by the decree.

Jhanda Singh v. Wahid-ud-din: I. L. R. 38 A. 570 (P. C.)

This branch of the law is far from being satisfactory. A mortgage by conditional sale is an ostensible sale and neither parol evidence of intention nor evidence of conduct, except in so far as it comes within the category of evidence of surrounding circumstances, being admissible, verbal analysis of the most microscopic character

1. (1883) I. L. R. 27 M. 243. 2. (1903) I. L. R. 8 B. 1.

is so often necessary to prevent the intention of the parties being defeated. Mortgages going under various names all over the country assume this form; in fact it is exceedingly doubtful if there are many genuine cases of sales with conditions of repurchase at all. We think that the rule laid down in some of the recent cases of this Court that after the Transfer of Property such transactions must *prima facie* be regarded as mortgages are more likely to effectuate the intention of parties than the rule to the contrary. To English lawyers, 30 year's delay in bringing the suit may no doubt look very long but in this country, it must be remembered that the period for redeeming mortgages is 60 years. To transactions before the Transfer of Property Act, the stricter rule laid down in this and the earlier cases will, of course, apply. On the facts, we have not anything very peculiar in this case. The agreement was not contemporaneous, and was also apparently not a part of the original transaction. The concession was granted out of feelings of kindness and not as a part of the business arrangement and was intended so far as the words of the deed went, to be only a personal concession. There was no covenant to pay and there was no proof of disparity between the mortgage amount and the value of the property. It is more in the observations and in the tendency that they indicate that the interest lies.

Sadik Husain Khan *v.* **Hashim Ali Khan**: I. L. R. 38 A. 627 (P. C.)

Their Lordships hold in this case that gifts through the instrumentality of trusts are as much governed by the Mahomedan Law as ordinary gifts though the Oudh Laws Act speaks only of gifts as being governed by that law and that S. 122 of the Transfer of Property Act has not made any change in that law so far as possession is required by it to accompany the gift.

Another matter of interest in the case is the reference made to the Mahomedan Law of Evidence. "It is also well established," it is said, "according to Mahomedan Law that if a member of the family such as Fatima Begum was of her husband's family, makes statements touching the sonship or heirship of a person such as are contained in many of the written documents she has signed, in reference to Sultan Mirza's heirship, those statements are good evidence of the family repute concerning

him." The law as to acknowledgment also is thus stated "the rule of the Mahomedan Law app'icable to the care is well established: no statement made by one man that another (proved to be illegitimate, is his son can make that other legitimate but where no proof of that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person; provided his legitimacy be possible." Is it their Lordship's view that the Mahomedan Law of Evidence and not merely the substantive rules of Mahomedan Law, in respect of the matters specified are applicable? (Cf. *The Collector of Gorakhpur* v. *Palakdhari Singh* [1], *Jafri Begam* v. *Amir Muhammad Khan* [2].)

Another interesting point in the case unconnected with the Mahomedan Law is the clear distinction that their Lordships point out between an onerous gift and a transfer for consideration though the two result in much the same legal consequences when the donee elects to accept the burden. The former their Lordships say is governed by the Mahomedan Law while the latter is not. In this case, the transfer purported to be in release of the dower right of the wife. No proof independent of the deed was given that any such agreement was entered into between the parties and their Lordships say "unless and until this agreement is proved to have been entered into, the grant and conveyance to the trustees must be taken to be a purely voluntary gift. Though it should be merely voluntary, F (*i.e.* the wife) might no doubt acting with the full knowledge of her rights deliberately elect to take the benefits conferred upon her by it in lieu of the balance of her dower. If she did so elect she would be bound by the choice thus made. But that election cannot create the agreement between her and her husband which is the sole consideration for the deed nor could it enlarge the operation of the deed itself. Notwithstanding it, the grant to the trustees would still remain a purely voluntary gift and the property which it passed would have to be ascertained on that footing. Subsequent election could not be held to be a substitute for the original consideration."

In this case, the Lord Chancellor, strongly animadverts upon the delay in the disposal of the case. While by no means minimising the necessity for speedy disposal, we do not think that the same

1. (1889) I. L. R 12 A. 1. 2. (1885) I. L. R. 7 A. 822.

standard can properly be applied to Indian litigation as to litigation in England. India is a country of great distances, with comparatively poor communications. The bulk of the litigant public are poor and largely illiterate. All these are factors that must undoubtedly make for delay without anybody specially to blame in the matter. On the other hand any attempt to rush might lead to great injustice. In some parts of the country, evasion of service and procrastination are no doubt regarded as approved methods of conducting litigation but it is wholly wrong to generalise on this basis for there are large areas in which the people are not averse at all to receive notices. A part of the delay is also due to the complex family law of this country which requires the presence of a large number of persons as parties and who are not *sui juris*. The appointment of a proper guardian takes a long time. Unbusiness-like habits no doubt also contribute to some extent to the delay but so long as the general level of education is not raised, overzeal for expeditious disposal may injure the very parties whom it must be the solicitude of Courts to protect.

Kanhaiya Lal *v.* Kishori Lal : I. L. R. 38 A. 679.

There may have been other facts in the case but the facts stated are by no means conclusive on the question. A compro mise may be an alienation but is ordinarily not. Again the doubtful rights involved may be only the rights of the widow and the reversioner's rights might be unaffected by those doubts in which case, obviously the compromise cannot bind the reversion. But the mere fact that the title of the widow is admitted in the compromise cannot be decisive. The conclusion arrived at by the compromise is the result of the compromise and cannot operate as admission of the rights of the parties apart from the compromise. The plaintiff widow in the case claimed the property; the defendant claimed it as his own. A compromise was arrived at by which the widow's right was admitted but the defendant was given the option to purchase it from the plaintiff. But for the option, the defendant may not have admitted the right of the plaintiff at all. The true test should be, we think, was the estate in jeopardy or honestly believed to be so and was the compromise honestly arrived at to save it. The Allahabad Court

took a very narrow view about the widow's powers of compromising and we doubt whether the present judgment is not a survival of a somewhat doubtful value having regard to the recent pronouncements of the Privy Council.

Bhaiorn Prasad *v.* **Amina Begum** : I. L. R. 38 A. 690.

Extension of time like adjournment may be a step in aid of execution or it may be the reverse. The whole thing is a question of fact depending on the circumstances of each case. The law is no doubt rendered uncertain but it must be remembered that the uncertainty while it may occasionally help the negligent decree holder, will never hurt an innocent debtor.

Muthammal *v.* **The Secretary of State for India** : I. L. R. 39 M. 1202.

Though this case may not be within the mischief of the observations of their Lordships of the Privy Council in *Gokul Mander* v. *Puhmunand Singh* [1], we do not believe that the extent to which the Survey Officer's order is conclusive can be decided by reference to general principles of *res judicata.* In a case like this, we have no judgment of a competent Court to deal with; we have on the other hand, an *order* of a Survey *Officer* based on information from village officers and such evidence as he can procure and though in the appellate stage, we have a *decision*, the proceedings nevertheless remain proceedings of officers not of courts or tribunals. Seeing, however, that the unsuccessful party is required to *establish the right* he sets up the legislature must be taken to intend that the conclusiveness should attach not only to the order but also to the *negativing* of the right but we imagine that under no conceivable circumstances could the order be held binding except *quoad* the particular object matter, *i.e.*, the land in dispute. We have somewhat analogous cases of orders passed by courts to which, though not as cases of *res judicata* proper, certain conclusiveness is attached.

[*End of Vol. XXXII.*]

1. (1902) I. L. R. 29 C. 770.

NOTES OF RECENT CASES.

Abdur Rahim and Oldfield, JJ. 1917, January 9. — S. A. No. 1271 of 1915.

Hindu Law—Partition — Declaration of divided status — Disposition of property by the same document—Grand-father, power of, to effect a partition.

It is open to a member of a joint Hindu family to effect a severance as regards his share of the property by a unilateral declaration and as part of the same transaction and by means of the same instrument, to dispose of his share by way of gift. Under the Mitakshara Law, a Hindu grand-father can effect a fair and equal partition of ancestral property between himself and his grandsons (the sons being dead) without the consent of the latter.

T. V. Muthukrishna Aiyar and *K. S. Jayarama Aiyar* for Appellant.

Hon'ble Mr. T. Rangachariar and *G. S. Ramachandra Aiyar* for Respondents.

Abdur Rahim, and Srinivasa Aiyangar, JJ. 1917, January 11. — A. S. No. 400 of 1914.

Water—Government right to regulate irrigation—Right to enter upon mitta land without consent of owner for purposes of carrying on works of irrigation.

The paramount right of Government to regulate the distribution of water for purposes of irrigation does not empower the Government to enter upon a mitta land and carry on works of irrigation without the consent of the Mittadar.

32 M. 141 referred to.

Government Pleader for Appellant.

J. L. Rozario, E. S. Chidambaram Pillai and *P. N. Marthandam Pillai* for Respondents.

Abdur Rahim and Srinivasa Aiyangar, JJ. 1917, January 15. — A. S. No. 373 of 1915.

Hindu Law—Widow—Surrender for consideration—Validity.

A surrender by a sonless Hindu widow in favour of the nearest reversioner is valid though it was made for consideration.

31 M. 446, (1913) M. W. N. 433, followed.

T. R. Ramachandraiyar, T. V. Venkataramaiyar, P. Narayanamurti, P. Nagabushanam, and *P. M. Srinivasa Aiyangar* for Appellant.

V. Suryanarayana Rao and *V. Ramadoss* for Respondents.

Wallis, C. J.
Abdur Rahim and
Srinivasa Aiyangar, JJ.
1917, January 16.

S. A. Nos. 1643 and 1644 of 1914.

Religious Endowment—Extinction of line of trustees—Right of founder or his heirs to appoint fresh trustees.

Per *Wallis, C.J. and Abdur Rahim, J. (Srinivasa Aiyangar, J. dissenting)*: It is competent to the founder of a religious endowment or his heirs, in whom the trusteeship has vested owing to the failure of the line of the original trustees, to create a new line of trustees.

Per Srinivasa Aiyangar, J: Unless the power of appointment is expressly reserved at the time of the foundation, the court alone can appoint fresh trustees.

A. Krishnaswami Iyer for Appellant.

V. Ramesam for Respondent.

Wallis, C. J.,
Abdur Rahim and
Srinivasa Aiyangar, JJ.
1917, January 16.

C. M. A. No. 279 of 1915.

Civil Procedure Code, O. 1, R. 3, O. 2, Rr. 3 and 6—Specific Relief Act, S. 27—Specific performance—Contract of sale by member of joint Hindu family—Suit for execution of conveyance, partition and possession, against vendor and his co-parceners—Misjoinder of parties and causes of action.

Per *Abdur Rahim, J.*, In a suit to enforce specific performance of a contract entered into by a member of a joint Hindu family to sell his share in certain family properties, it is competent to the vendee to ask for the execution of a conveyance and possession of the properties by means of a partition among the vendor and his co-parceners, impleading the latter as parties to the suit.

Per *Wallis, C. J.* (*Srinivasa Aiyangar, J.* contra). The co-parceners of the vendor were not proper parties to the suit for possession. *Tasker* v. *Small*, 3 My. and Cr. 63, followed.

Per *Wallis, C. J. and Srinivasa Aiyangar, J.* It is not competent to the plaintiff to ask for the execution of a conveyance and for possession by means of a partition, in the same suit.

T. Narasimha Iyengar for Appellant.

L. A. Govindaraghava Iyer for Respondent.

NOTES OF RECENT CASES.

Oldfield and Bakewell, JJ.
1917, January 16.

C. M. A. No. 231 of 1916.

Caste Disabilities Removal Act XXI of 1850—Scope of—Hindu Law—Hindu convert to Christianity—Descendant of—Right to succeed as reversioner to Hindu to whom he could have succeeded but for conversion.

The descendant of a Hindu convert to Christianity is not entitled to succeed as reversioner to the estate of a deceased Hindu to whom he would have succeeded but for his ancestor's conversion. 11 A. 100 diss. from. Act XXI of 1850 applies to persons who have themselves become converts and not to their descendants.

T. V. Muthukrishnaiyar for Appellant.

T. R. Venkatarama Sastriar and *K. Aravamuda Aiyangar* for Respondents.

Wallis, C. J.
Seshagiri Aiyar, J.
1917, January 23.

A. S. No. 207 of 1914.

Civil Procedure Code, O. 22, R. 4—Abatement—Suit for accounts and recovery of moneys due from agent—Death of agent—Liability of legal representative.

Where during the pendency of a suit for rendition of accounts and for recovery of money due to the plaintiff from the defendant who had acted as his agent, the latter died, *held* that the cause of action survived against his legal representatives who would be liable to pay out of the assets of the deceased, any sum proved by the plaintiff to have been misappropriated by the agent.

T. Narasimha Iyengar and *K. S. Jayarama Iyer* for Appellants.

A. Krishnaswami Iyer for Respondents.

Sadasiva Aiyar and Spencer, JJ. 1917, January 23. S. A. No. 954 of 1915.

Limitation Act, S. 7, art. 44—Sale by Hindu mother as guardian of her only son—Son in utero *at the time of sale—Purchaser dispossessed—Suit for possession—Limitation.*

A Hindu mother executed a sale-deed as guardian of her only minor son. At the time of the sale she had another son *in utero.* Subsequently the purchaser was dispossessed by a person who had taken a conveyance from the two sons. In a suit by the prior purchaser for possession more than 3 years of the first son's attaining majority but within 3 years of the son's majori y, *held* that as no suit had been brought to set aside the sale under art. 44 of the Limitation Act the share of the first son enured to the purchaser. No sale having been executed by the mother as guardian of her second son his share did not pass by the sale and stood unaffected.

Held further that the cause of action for the two sons being different, S. 7 of the Limitation Act had no application to the case and the plaintiff was not entitled to the share of the second son.

C. V. Ananthakrishna Aiyar for Appellant.

K. Bashyam for Respondent.

Sadasiva Aiyar, and Spencer, JJ. 1917, January 23. S. A. No. 275 of 1915.

Hindu Law—Adoption by Widow—Effect on prior alienation by widow.

Their Lordships referred to a Full Bench the question whether an alienation by a Hindu widow prior to her adopting a son, holds good during her widowhood even as against the adopted son.

Sriramulu v. *Kristamma* [1] and *Ramakrishna* v. *Tripurabai* [2] Referred to.

T. R. Ramachandra Iyer for Appellant.

K. S. Ganesa Iyer for Respondent.

1. I. L. R. 26 M. 143. 2. I. L. R. 33 B. 88.

Sadasiva Aiyar and Spencer, JJ.
1917, January 24.

S. A. No. 1252 of 1915.

Civil Procedure Code, S. 102—Second Appeal—Suit of Small Cause nature, transferred to regular side under S. 23 of the Prov. Sm. C. C. Act.

A suit of a nature cognisable by the Small Cause Court does not cease to be such within S. 102 of the Civil Procedure Code, because the plaint was returned by the Small Cause Court under S. 23 of the Prov. Sm. C. C. Act, to be filed on the regular side on the ground that the suits involved questions of title.

R. Kuppusamy Aiyar for Appellant.

C. V. Ananthakrishna Aiyar for Respondent.

Sadasiva Aiyar and Spencer, JJ.
1917, January 24.

S. A. No. 835 of 1915.

Defamation—Question as to whether a certain document is defamatory, if a question of fact—Damages—Quantum of, if a question of fact.

Per Spencer, J.; (Sadasiva Aiyar, J. dubitante*)*:

The question whether a particular article in a newspaper is defamatory of the plaintiff is one for the jury and as such a question of fact with which a High Court will not ordinarily interfere in second appeal. So also is the question of the quantum of damages awardable to the plaintiff in an action for defamation.

T. Rangacharier and P. R. Ganapathi Aiyar for Appellant.

G. S. Ramachandra Aiyar for Respondent.

Abdur Rahim, and Srinivasa Aiyangar, JJ.
1917, January 25.

C. M. P. No. 2244 of 1916, and C. M. P. No. 3099 of 1916, in A. S. No. 199 and 258 of 1915.

Madras Impartible Estates Act (II of 1904) S. 4 (1) and (3)—Power of proprietor to make a will—"Default of heirs", meaning of.

It is not competent to the proprietor of an impartible estate to make a will when there are heirs either agnate or cognate who

are entitled to succeed to him under the Hindu Law. The restriction on alienation is not confined only to cases where there are other members of the family, who if the estate were partible, would be co-parceners with the proprietor.

C. V. Ananthakrishna Iyer, for Petitioner.

The Hon. The Advocate-General and *G. S. Ramachandra Iyer* for Respondent.

Wallis, C. J.
and Seshagiri Ayer, J.
1917, January 25.

O. S. A. Nos. 67 and 70 of 1916.

Jurisdiction—Execution—High Court, if can transmit its decree for execution in a Native State.

The High Court has no power to transmit its decree for execution to a Native State, there being no provision in the Civil Procedure Code to enable it to do so.

The Hon. The Advocate-General for Appellant.

A. Krishnaswami Ayer, for Respondent.

Oldfield, J.
Bakewell, J.
1917, January 25.

C. M. A. No. 67 of 1916.

Provincial Insolvency Act, S. 6 (4) (a)—Petitioning Creditor's debt —Nature of—Debts aggregating to five hundred rupees—Debt which the debtor owes jointly with one of the petitioning creditors to another of the petitioning creditors—Whether a good petitioning creditor's debt.

A debt which the debtor owes jointly with one of the petitioning creditors to another petitioning creditor is a good petitioning creditor's debt on which the debtor can be adjudicated insolvent. Any right of contribution which the debtor may have against the joint debtor can only be taken as one of the items of his assets.

S. Varadachariar for *T. M. Krishnaswami Aiyar* for the Appellant.

C. S. Venkatachariar for the Respondent.

NOTES OF RECENT CASES.

Wallis, C. J.
and Spencer, J.
1917, January 17.

S. A. No. 1035 of 1914.

Landlord and Tenant — Permanent lease—Usufructuary mortgagee from tenant—Landlord cannot sue for rent from mortgagee—No privity of estate.

A. demised certain lands on permanent lease to B. who usufructuarily mortgaged his lease-hold interest to C. in a suit for rent by A. against B. and C.

Held, that A. had no right to sue C. for rent, as there was neither privity of contract nor privity of estate between them.

K. R. Subramania Sastri for Appellant.
T. R. Ramachandra Iyer for Respondent.

Wallis, C. J.
Sadasiva Iyer and
Seshagiri Iyer, JJ.
1917, January 18.

C. R. P. Nos. 427 to 435 of 1916.

Madras Estates Land Act, S. 3 (2) (d)—Inam—Resumability granted in inam—Tanjore Palace estate, if an 'estate'.

The Tanjore palace estate was 'granted in inam' in 1862, by the British Government to the widows of the late Raja of Tanjore. 3 M. H. C. R. 424 Referred to.

The fact that the Government have no right of reversion in the subject of the grant does not take it out of the category of "inam". Where the Kudivaram of a village forming part of the Tanjore Palace estate, has all along been with the tenants on the land; the village comes within S. 3 (2) (d) of the Madras Estates Land Act.

The Hon'ble The Advocate General and *K. V. Krishnaswami Iyer* for Petitioner.

G. S. Ramachandra Iyer and *A. V. Visvanatha Sastri* for Respondents.

Wallis, C. J. and
Seshagiri Iyer, J.
1917, January 22.

A. S. No. 128 of 1914.

Easements Act, S. 15—Easement, acquisition of, by prescription—Enjoyment under invalid grant.

S. 15 of the Easements Act is clear and excludes the applicability of the principle enunciated in *Labrador Co.* v. *R.* (1893)

A. C. 104 that the enjoyment of an easement under an invalid grant for the prescriptive period will not give a prescriptive title.

V. Ramesam for Appellants.

A. Krishnaswami Iyer for Respondents.

Wallis, C. J. and Seshagiri Iyer, J. 1917, January 29. — A. S. No. 192 and 193 of 1915.

Principal and agent—Nattukottai Chetties—Suit for accounts—Specification of definite sums alleged to be improperly withheld—Limitation Act, arts. 89 and 90—Termination of agency, question of fact in each case.

Where a Nattukottai Chetty principal brought a suit against his agent for rendition of accounts, specifying in the schedule to the plaint a number of items alleged to be due to him in default of any explanation from the defendant, *held* that the suit was one for accounts and was governed by art. 89 and not by art. 90 of the Lim. Act.

Venkatachalam v. *Narayanan* (1914) I. L. R. 39 Mad. 376 does not lay down as a matter of law, the point of time at which an agency terminates, but the matter is one to be decided on the facts of each case.

Nagappa Chetty v. *Chidambaram Chetty* 31 M. L. J. 687 Referred to.

A. Krishnaswami Iyer for Appellant.

The Hon'ble The Advocate General and *K. Bhashyam* for Respondent.

Oldfield and Bakewell, JJ. 1916, January 30. — C. M. S. A. No. 24 of 1915.

Civil Procedure Code, O. 21 Rr. 2 and 16—Assignment of decree—Application by assignee to execute—Plea that assignment was benami *for judgment-debtor—Uncertified adjustment, evidence of.*

Where an assignee decree-holder applies for execution of the decree, it is open to the judgment-debtor to show by evidence that the assignment was *benami* for himself and that therefore the decree is unexecutable. Evidence of facts constituting an uncertified adjustment may be received in the course of such an enquiry, the prohibition in O. 21 R. 2 C. P. Code not being applicable to the case.

T. R. Ramachandra Iyer for Appellant.

K. S. Jayarama Iyer for Respondent.

Oldfield and Bakewell, JJ.
1917, January 30.

L. P. A. No. 167 of 1916.

Contract Act, S. 23—Agreement to remunerate pleader's clerk for conducting execution proceedings, if enforceable.

Where a client engaged a pleader to conduct proceedings in execution of a decree and at the same time agreed to remunerate the pleader's clerk for attending to all matters in connection with the execution proceedings and the clerk sued to recover the moneys promised by the client.

Held, per *Oldfield, J.* That the agreement was not opposed to public policy and could be enforced. *Janson* v. *Driefontien Consolidated Mines Co.*, (1902) A. C. 484 foll.

Per *Bakewell, J.* The agreement was repugnant to Ss. 10 and 13 of the Legal Practitioners' Act and unenforceable.

V. Ramadas for Appellant.

P. M. Srinivasa Iyengar for Respondent.

Oldfield and Bakewell, JJ.
1917, January 31.

C. M. S. A. No. 4 of 1916.

Probate and Administration Act, S. 23—Application for letters of administration—Scope of inquiry — Caste custom—Appeal against order granting letters of administration—Court fee.

On the application of the divided son of a deceased Nattukottai Chetty for letters of administration to his estate, the widow of the deceased who opposed the grant, set up a will in her favour and also pleaded a caste custom under which she was a preferential heir to the divided son. The Lower Court refused to go into the question of custom on the ground that it was foreign to the scope of the enquiry under S. 23 of the Prob. and Admn. Act. On appeal by the widow against the order granting letters of administration to the divided son, *Held* that *ad valorem* court-fee need not be paid on the appeal, the case coming under Sch. ii art. 1 of the Court Fees Act.

Rodrigues v. *Mathias* (1911) 21 M. L. J. 481 followed.

Held, further, that the question as to who was the preferential heir to the deceased came within the scope of the enquiry under S. 23 of the Prob. and Admn. Act.

Raghu Nath v. *Mt. Pate Koer* (1901) 6 C. W. N. 345;

Ochavaram Nanabhai v. *Dolapam Jamaitram* (1904) I.L.R. 28 Bom. 644 Distinguished.

The Hon'ble Mr. T. Rangachariar for Appellant.

The Hon'ble The Advocate General and *G. S. Ramachandra Iyer*, for Respondents.

Ayling and Napier, JJ.
1917, February 2. } S. A. No. 2017 of 1912.

Appeal—Right of—Application under S. 331 of the C. P. Code of 1882, registered as a suit—Passing of the new Code during pendency of suit, before decree—Right of appeal not taken away—C.P. Code (1908) S. 154.

Where a person holding a decree for possession of land applied under S. 331 of the Code of Civil Procedure, 1882, his application was registered as a suit. During the pendency of the suit and before the passing of the decree, the C. P. Code of 1908 came into force. *Held*, that there was vested in the parties a right to appeal from any decree that might be passed in the suit and that the right was not taken away by the new Civil Procedure Code.

The *Colonial Sugar Refining Company* v. *Irving* (1905) A. C. 369, *Kalinga Hebbara* v. *Narasimha Hebbara* 21 M. L. J. 631 followed.

Benod Bihari Bhadra v. *Ram Sarup* (1912) 16 C. W. N. 1015 distinguished.

A. V. Visvanatha Sastri for Appellant.

T. R. Venkatrama Sastri for Respondent.

Oldfield and Bakewell, JJ.
1917, February 6. } C. R. P. No. 259 of 1913.

Limitation Act, S. 13—Absence from territories beyond British India—Defendant residing at Singapore—Exclusion of time.

"The territories beyond British India under the administration of the Government" has reference to those parts of India which are under the administration of the British Indian Government but not situate within the limits of British India as defined in S. 3 (7) of the General Clauses Act. A plaintiff is therefore entitled to deduct the time during which the defendant has been absent in Singapore.

G. S. Ramachandra Aiyar for Petitioner.

K. Krishnaswami Aiyangar for Respondent.

NOTES OF RECENT CASES.

Sadasiva Aiyar and Spencer, JJ. 1917, January 23. — S. A. No. 272 of 1915.

Landlord and Tenant—Agricultural lease with annual rent reserved—Reasonable notice to quit—What is.

There is no hard and fast rule for determining what is a reasonable notice to quit in the case of agricultural leases with annual rent reserved. Ordinarily a six month's notice ending with a year of the tenancy is necessary. But there may be cases in which the notice need not be a six month's notice and need not end with a year of the tenancy.

Circumstances relevant to the determination of what is reasonable notice in such cases.

S. Parthasarathy Iyer, for Appellant.

K. Raja Aiyar, for Respondents.

Coutts Trotter and Seshagiri Aiyar, JJ. 1917, January 23. — A. S. No. 186 of 1914.

Religious Endowments Act XX of 1863—S. 3—Temple Committee—Jurisdiction—Temple located within British territory—Particular deity in respect of which dispute exists not kept in British territory—Effect.

The fact that the particular duity in which the parties to a suit appear to be interested is not kept in British territory will not deprive the Temple Committee of its jurisdiction under S. 3 of the Religious Endowments Act XX of 1863.

M. O. Parthasarathy Iyengar and *K. P. Lakshmana Rao* for Appellants.

T. Prakasam, V. S. Narasimha Chari with him, for Respondents.

Coutts Trotter and Seshagiri Iyer, JJ. 1917, January 23. — A. S. No. 261 of 1913.

Malabar Law—Kanom—Redemption suit—Right of jenmi to interest on arrears of Purappad—Right to set off arrears and interest against Kanom and value of improvements—Absence of provision in deed for interest—Effect.

In a suit for redemption the jenmi is entitled to set off against the kanom and value of improvements all the arrears of "Purappad" due together with interest on the same even though the document does not provide for interest.

8 M. 381, foll. 29 M. L. J. 772 explained; Custom of Malabar ref. to.

C. Madhavan Nair, for Appellant.

T. R. Ramachandra Iyer, for Respondents.

Ayling and Napier, JJ.
1917, January 24. } S. A. No. 1085 of 1916.

Civil Procedure Code (Act VIII of 1859)—S. 185—Translation of English Judgment made under provisions of primary evidence of its contents—Public Document—Admissibility in evidence of certified ccpy of sheet containing seal of Court torn—Effect.

In a case in which a judgment written in English was, under S. 185 of Act VIII of 1859, translated into the language in ordinary use in the Court by which the judgment was delivered, and the translation was signed by the Judge *held*, that the translation was primary evidênce of the contents of the judgment.

4 I. C. 579, foll.

A certified copy of a public document is admissible in evidence even though the sheet containing the seal of the Court is torn.

T. V. Venkatarama Aiyar and *R. Rajagopala Aiyar* for Appellants.

A. Krishnaswami Aiyar and *A. N. Sitarama Sastri* with him for Respondents.

Oldfield and Bakewell, JJ.
1917, January 26. } C. M. A. No. 47 of 1916.

Provincial Insolvency Act (III of 1907)—"Creditor and debtor"—Relationship of—What constitutes—Hindu Law—Father's debt—Death of father—Adjudication of undivided son for father's debt when possible—Right of father's creditor to present petition for adjudicating son an insolvent.

Where a Hindu, who had borrowed money for family purposes died without discharging the debt and leaving undivided sons and family properties and the creditor applied for the adjudi-

cation as an insolvent of the eldest of the sons alleging that he was the managing member of the family, that he had executed a nominal sale-deed in respect of the family properties with the intention of defeating his rights and that by reason of the said alienation the sons were unable to pay (the creditors) the debt from out of the family properties, and the court below dismissed the petition on the ground that the relationship of debtor and creditor did not exist between the parties within the meaning of the Provincial Insolvency Act, held, reversing the order of the court below, that the relationship in question did exist and that the application must be proceeded with.

A. S. Visvanatha Aiyar for *K. V. Krishnaswamy Aiyar* for Appellant.

K. R. Guruswami Aiyar and *A. Subbaramaiyar* for Respondents.

Oldfield and Bakewell, JJ.
1917, January 26. C. M. A. No. 95 and 96 of 1916.

Life Insurance Policy—Suit upon—Forum—Place of death of insured different from place of contract and place where money is made payable—Effect.

A policy of Life Insurance may be sued upon at the place where the insured died, though the place where the contract was entered into and the money was made payable by the contract is different.

B. Sitarama Rao for Appellant.

Hon. T. Rangachariar and *A. V. Seshayya* for Respondents

Chief Justice and Seshagiri Aiyar, J.
1917, February 2. A. S. No. 300 of 1914.

Limitation Act—Art. 124—Applicability—Malabar Law—Stanom—Alienation of property by Stani—Suit by his successor for recovery of property—Limitation.

A suit by a Malabar Stani for the recovery of possession of a temple and its properties from a person to whom his predecessor in stanom had alienated the trusteeship is governed by Art. 124 of the Limitation Act.

T. R. Ramachandra Aiyar, A. Nilakanta Aiyar and *P. V. Parameswara Aiyar* for the Appellants.

C. V. Anantakrishna Aiyar for Respondent.

Sadasiva Aiyar and Spencer, JJ.
1917, February 6.

S. A. No. 936 of 1913.

Malabar—Customary Law—Anandiravakasam tenure of perpetual duration—Forfeiture of holding—Setting up, title of third party—Effect.

According to the customary law of Malabar a person who holds of another under what is known as an Anandiravakasam tenure of perpetual duration in which there is no reservation of rent or services incurs no forfeiture by setting up the title of a third party.

C. V. Anantakrishna Aiyar for Appellant.

T. R. Ramachandra Aiyar, A. Narayanasarma and *P. V. Parameswara Aiyar* for Respondents.

Ayling and Napier, JJ.
1917, February 6.

S. A. No. 842 of 1915.

Limitation Act—Art. 113—Applicablity of first and second parts—Contract to be performed on a contingency Suit by third party—Beneficiary—Limitation—Starting point—Suit by other party to contract—Limitation—Starting point.

Where A entered into a contract with B to the effect that on payment by B to A of a certain sum the latter was to assign a decree in his favour to C, *held*, in a suit by C against A for the specific performance of the contract by the execution of an assignment deed, that limitation began to run from the date on which A refused to perform the Contract and not from the date on which B made the payment stipulated by the contract.

Held, that the second part of Art. 113, and not the first, applied to cases in which the person suing was not necessarily in a position to know of the occurence of the contingency contemplated by the contract.

Quaere: whether if the suit had been by B himself, the suit would still fall within the second part of Art. 113.

G. Venkataramiah for The Government Pleader V. Ramesam for Appellants.

M. Patanjali Sastri for P. Narayanamurti for Respondents.

NOTES OF RECENT CASES.

Sadasiva Aiyar and Spencer, JJ. 1917, February, 6. — S. A. No. 1379 of 1915.

Hindu Law—Joint family—Father—Power to effect a partition by will—Minor member, if bound by arrangement—Mother not the guardian while father is alive—Gift of a small portion of family property to daughter, if valid.

A Hindu father shortly before his death executed an unregistered document styled a will under which he divided the ancestral family properties into 4 shares and allotted a share to his son by his deceased first wife, another to his minor son by his second wife, the third to his daughter and reserved the residue to be enjoyed by himself and his wife for life and thereafter by his two sons. It was found that the share allotted to the daughter was a fairly small portion of the property and that the major son by the first wife and the second wife on behalf of the minor son had consented to the arrangement, which was otherwise *bona fide* and reasonable:

Held, that the father was competent to effect the arrangement with the consent of his major son, in spite of the existence of a minor son at the date, that the consent of the mother (second wife) on behalf of the minor son was ineffectual, she having no right to the guardianship of her son during the existence of the father; and that the gift of a small portion of the family property to the daughter ought to be upheld.

Briraj Singh v. *Shedan Singh*, (1913) I. L. R. 35 A. 337; *Kamakshi Ammal* v. *Chakrapani Chettiar*, (1907) 17 M. L. J. 528; *Anivillah Sundaramaya* v. *Cherla Seethamma* (1911) 21 M. L. J. 695; *Arunachella Pillai* v. *Sampurnathachi*, (1907) 27 M. L. J. 485, Referred to.

G. S. Ramachandra Aiyar for Appellant.

T. R. Venkatarama Sastri for Respondent.

Sadasiva Aiyar and Spencer, JJ. 1917, February 6. — S. A. No. 2565 of 1913.

Civil Procedure Code, S. 99 and O. 1, R. 3—Misjoinder of parties and causes of action—Redemption suit—Third parties claiming title paramount, impleaded—Misjoinder—Reversal o Lower Court's decision on the ground of.

In a suit for redemption plaintiff impleaded the mortgagee and also another person who set up his own title to some of the items but who, the plaintiff alleged, had collusively obtained a mortgage from his mortgagee. The Lower Appellate Court reversed the decree of the first court and dismissed the suit on the ground of misjoinder of parties and causes of action.

Held, that the suit ought not to have been dismissed on that ground. In a suit for redemption and possession, the stranger claiming possession was a proper party and the case did not come within the rule laid down in *Radha Kunwar* v. *Reoti Singh* (1916) I. L. R. 38 A. 488 P. C.

C. V. Ananthakrishna Iyer for Appellant.

T. R. Ramachandra Iyer for Respondent.

Sadasiva Aiyar and Spencer, JJ.
1917, February 7. — S. A. No. 2703 of 1913.

Limitation Act, S. 22—Mortgage suit—Suit by one of two joint mortgagees—Addition of other mortgagee after limitation—Effect of.

It is not competent to one of two representatives of a deceased mortgagee, not being the manager of a joint Hindu family, to institute a suit on the mortgage without joining the other as a party to the suit. If the other representative is added after the expiry of the period of limitation, the whole suit is barred and must be dismissed in its entirety.

Duri Bhagavanbi v. *Tadepatri Veeravadhanulu,* (1909) I. L. R. 33 M. 246; *Imam-ud-din* v. *Liladhar,* (1892) I. L. R. 14 A. 524, Referred to.

K. R. Rangaswami Iyengar for Appellant.

A. V. Visvanatha Sastri for *G. S. Ramachandra Aiyar* for Respondent.

Wallis, C. J.
1917, February 7. — C. M. S. A. No. 123 and 124 of 1916.

Civil Procedure Code, O. 21. Rr. 2 and 11—Application for entry of satisfaction time-barred—Execution, application for—Duty of decree-holder to state satisfaction—Court if bound to take cognizance of satisfaction.

A decree-holder applied for arrest of the judgment-debtor in execution of a decree which had been satisfied more than three months before the application and the judgment-debtor also applied to have satisfaction entered up in the decree. The judgment-debtor contended that it was the duty of the decree holder under O. 21, R. 11, C. P. Code to state in his application the fact of satisfaction of decree and that his omission to do so was a fraud on the Court, which entitled it to take cognizance of the satisfaction *suo motu*. *Held*, that it was incompetent for the judgment debtor who had failed to apply for satisfaction within time, to take advantage of the decree-holder's duty to state the particulars required by O. 21, R. 11 C. P. Code and to get an in-certified adjustment indirectly recognised.

Hansa Godhaji v. *Bhawa Jagaji* (1915) I. L. R. 40 Bom. 333. *Trimbak Ramkrishna* v. *Hari Laxman* (1910) I. L. R. 34 Bom. 575 distinguished.

K. R. Gurusami Iyer and *A. Subbarama Iyer* for Appellant.

Sadasiva Iyer, and Spencer, JJ.
1917, February 12.

S. A. No. 2602 of 1914.

Transfer of Property Act, S. 59—Mortgage — Attestation, meaning of—Mortgagor must sign in the presence of attestors—Admission of execution in the pleadings—Proof of attestation, if unnecessary—Evidence Act, S. 70.

In the absence of any proof *aliunde* that the execution of a mortgage document was made in the presence of the attestors and where the attesting witness himself deposes that the mortgagor did not execute it in his presence, the document is not validly attested within the meaning of S. 59 of the T. P. Act and does not operate as a mortgage notwithstanding the admission of execution by the mortgagor in his written statement.

35 Mad. 607 P. C. foll.

V. C. Seshachari for Appellant.

S. Ranganadha Iyer for Respondent.

Oldfield and Bakewell, JJ.
1917, February 12.

C. M. S. A. No. 75 of 1916.

Limitation Act, Art. 180—Decree-holder purchaser—Application for possession—Limitation.

An application for possession by a decree-holder-purchaser is not an application to execute the decree and is governed by Art. 180 of the Lim. Act.

Sultan Sahib v. *Chidambara Chettiar* (1908) 32 Mad. 136; *Ramasamy Iyer* v. *Abdul Aziz Sahib* (1916) 19 M. L. T. 164 followed.

A. V. Visvanatha Sastri for Appellant.

T. S. Krishna Iyer for Respondent.

Sadasiva Aiyar and Spencer, JJ. 1917, February 13. — C. M. P. No. 2358 of 1916.

Civil Procedure Code—S. 110—Leave to appeal to Privy Council—Conditions—Para 1—Subject-matter of suit—Para 2—"Property"—Meaning —Claim to water-right—Valuation for purposes of S. 110—Principles—Para 3—When certificate under, will be given.

In a suit in which the plaintiffs prayed, in effect, for a declaration of their right to have the water of a channel flowing on to the lands of their village and for an injunction restraining the defendants, the ryots of a neighbouring village, from interfering with the exercise by the plaintiffs of their said right, *held*, that the "subject-matter of the suit" within the meaning of Para 1 of S. 110 of the code was the specific right claimed and the value of that right for the purposes of para 1 of S, 110 could be properly ascertained only on the basis of the detriment or injury which plaintiff would suffer if that right was negatived.

The word "property" in para 2 of S. 110 means a claim to rights in property. Para 2 itself means that the suit must involve rights or claims to property which rights and claims are worth Rs. 10,000 and upwards.

6 Bom. L. R. 403 (406) 18 W. R. 21 foll.

Where all the questions of law arising in the case were covered by several decisions and the only question was as to the applicability of the law to the particular case *held*, that the case was not one for a certificate under para 3 of S. 110 I. P. C.

2 L. W. 145 foll.

T. R. Venkatarama Sastri and M. S. Vaidyanathaiyar for Petitioners.

Government Pleader (*S. K. Parthasarathy Iyengar* with him) and *A. S. Visvanathaiyar* for Respondents.

NOTES OF RECENT CASES.

Abdur Rahim and
Srinivasa Aiyangar JJ.
1917, February 13.

A. S. No. 196 of 1914.

Hindu Law—Sanyasam—Entrance into order of, by Brahmins—Necessary ceremonies—Proof—Quantum.

A Brahmin cannot be said to have become a sanyasi in the absence of evidence to show (1) that he had undergone all the ceremonies prescribed for the purpose, especially that he had uttered the praishamantram and (2) that he had relinquished his interest in all his wordly property. The fact that he had assumed the external symbols of a Sanyasi such as dress etc., is not enough.

Hon. The Advocate-General and *S. Desikachariar* for Appellants.

T. R. Ramachandraiyar, B. Narasimha Rao, D. Appa Rao and *N. A. Krishna Aiyar* for Respondents.

Abdur Rahim and
Seshagiri Aiyar, JJ.
1917, February 19.

A. S. No. 71 of 1916.

Evidence Act, S. 35—Register of births and deaths maintained by village Reddi or Karnam—Entry as to date of death, admissible in evidence.

A Register of Births and Deaths kept by a village Karnam or Reddi in compliance with the standing orders of the Board of Revenue falls within S. 35 of the Evidence Act. An entry recording the death of a person in such a register is admissible to prove the date of his death.

T. V. Venkatarama Iyer for Appellant.

T. Prakasam for Respondent.

Wallis, C. J. and
Seshagiri Aiyar, JJ.
1917, February, 23.

L. P. A. No. 19 of 1916.

Malabar Law—Marumakatayam tarwad—Gift by uncle to his four nieces—Nature of property taken.

Where an uncle following the Marumakatayam Law made a gift of certain properties to his nieces, children of the same mother and there was nothing in the grant to show that an absolute alienable estate was intended to be conferred, *held*, that

the property was intended to be given as putravakasam property *Chakkara Kannan* v. *Kunhi Pokker* (1915) I. L. R. 39 M. 317= 29 M. L. J. 481 followed.

Judgment of *Kumaraswami Sastri, J.* in *Kayyalil Kundan Kutty* v. *Vayalpath Parkum* (1916) 32 I. C. 107 affirmed.

A. Sundaram for Appellant.

C. V. Ananthakrishna Iyer for Respondents.

Wallis, C. J. and Seshagiri Aiyar, J. 1917, February 23. — A. S. Nos. 60 to 63 and 65 of 1915.

Limitation Act, Art. 91—Undue influence—Suit to set aside transaction—Limitation—Starting point—Cessation of undue influence—Trustee—Compromise—Alienation of property—Right of beneficiary.

The starting point of limitation for a suit to set aside a document on the ground that it was executed under undue influence is the date when the undue influence ceases.

Sri Krishan Lal v. *Mt. Kashmiro* (1916) 31 M. L. J. 362 Referred to.

When a trustee enters into a compromise on behalf of the trust in pursuance of which he confirms an alienation of the trust property, the beneficiary acquires under S. 63 of the Trusts Act a cause of action to set aside the transaction.

The Hon. The Advocate-General and *K. Balasubramanya Iyer* for appellant.

G. S. Ramachandra Iyer and A. V. Visvanatha Sastri for Respondents.

Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ. 1917, February 23. — L. P. A. No. 147 of 1916.

Execution Sale—Boundaries and area, conflict between—What passes under sale—Intention.

Where the decree for sale of some villages in a mortgage suit comprised certain hamlets and the sale was clearly intended to include them, but the boundaries given in the application for execution and the subsequent proceedings and the sale certificate did not include them, though the description of the villages, their extent, income and peishcush all followed the description in the decree, *held* that the hamlets also passed to the auction purchaser.

In determining what was intended to be sold, where there is a conflict between the boundaries and the measurements, more importance would no doubt be attached to the boundaries. Where,

however, the boundaries are indefinite as in the case of forest tracts the measurements assume more importance. The question in every case is what was the intention of the parties.

B. Somayya for *P. Narayanamurti* for Appellant.

Hon. Mr. T. Rangachariar for Respondent.

Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ. 1917, February 23. — L. P. A. No. 121 of 1916.

Contract Act, S. 15—Coercion—Threat of suicide—Deed induced by, voidable.

Where a person caused his wife and son to execute a deed of release of their reversionary rights, under threat of suicide unless the deed were executed.

Held, per *Wallis, C. J. and Seshagiri Aiyar, J.* (*Oldfield, J. contra*) that the deed was voidable as having been brought about by coercion. It is clearly the policy of the Indian Penal Code to forbid suicide and a threat of suicide by a husband to his wife or a father to his son clearly comes within S. 15 of the Contract Act.

Per Seshagiri Aiyar, J:—"Any act forbidden by the Indian Penal Code" is much wider than "an act punishable by the Code."

M. Patanjali Sastri for *P. Narayanamurti* for Appellants.

G. Venkataramiah for Respondents.

Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ. 1917, February 23 — L. P. A. Nos. 197 to 200 of 1916.

Ejectment—Landlord and tenant—Lease of building sites—Erection of buildings—Silence or knowledge of landlord—Compensation.

Per Seshagiri Aiyar, J.—Neither the fact that the lease was of building sites nor the fact that the lease did not specify any period during which it was to subsist, is enough to make the tenancy permanent. Even a tenancy for building purposes is not to be presumed to be permanent, if the origin of the tenancy is known. Where a tenant is lawfully ejected by the landlord, his only right under S. 108 (h) of the Transfer of Property Act is to remove the superstructure within the period of the tenancy.

Per curiam: To entitle a tenant to compensation on the determination of the tenancy by the landlord, for the value of permanent structures erected on the land, it is necessary to show something more than the landlord simply gave permission to

build or that the landlord kept quiet being aware of the erection of structures.

Ramsden v. *Dyson* (1865) L. R. 1. E. and I. A. (H. L.) 129; *Angammal* v. *Aslami Sahib* (*1913*) I. L. R. 38 M. 710 Referred to.

The Hon. The Advocate General and *M. Purshotam Naidu* for appellant.

M. Tirunarayanachariar fo Respondent.

Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ. 1917 February 23. — L. P. A. No. 175 of 1915.

Mahomedan Law—Navayats—Suit for partition among descendants of mahomedan traders—Principles applicable to—Actings of parties, effect of.

A Mahomedan belonging to the Navayat community set up a trading business in 1818 and later on, a younger brother of his joined him in managing the concern. In 1845 the entire property of the trading business was described as that of the elder brother and the younger was declared entitled to an eighth share. Subsequently however the brothers went on living and trading together without specific division of assets or profits and equally enjoying the properties purchased in the name of either. In a suit for partition in 1910, by the descendants of the two brothers.

Held, that the properties must be treated as if they belonged to the two brothers as equal owners and a partition effected on that basis.

Ordinarily when a Mahomedan trader dies leaving descendants who live and continue to trade jointly, the properties are held by them in common in accordance with the shares to which they would be entitled under the Mahomedan Law. Having regard to the fact that the parties were *Navayats* and to the long course of actings and conduct of the parties, the same considerations applied to the case as would govern the business of Hindu family firms.

Khatija v. *Ismail* (1889) I. L. R. 12 M. 380 Ref.
Mahomed Musa v. *Aghore Kumar Gangali* (1915) I. L, R. 42 C. 801 P. C.

B. Sitarama Row for Appellant.

J. L Rozario and *H. Balakrishna Row* for Respondent

NOTES OF RECENT CASES.

Ayling and Napier, JJ. *1917 February, 23.* — S. A. No. 828 of 1915.

Trust—Co-trustees—Suit by some to set aside alienation by the rest, if maintainable.

Where five of the trustees of a Devaswam sued to set aside a lease granted by the sixth without consulting the latter before the institution of the suit, *Held,* that the suit was maintainable, the necessity for consulting the other trustee being a mere formality.

K. P. M. Menon for Appellants.

C. V. Ananthakrishna Aiyar and Kutti Krishna Menon for the Respondents.

Sadasiva Aiyar and Spencer, JJ. *1917, February 26.* — L. P. A. No. 222 of 1916.

Limitation Act, S. 12—Application for review—Time spent in obtaining copies, if may be deducted.

In an application for review the applicant is entitled, under S. 12 of the Limitation Act, to deduct the time spent in obtaining copies of the judgment and decree sought to be reviewed, from the time limited by Art. 173, though under the rules of procedure it is not necessary for him to file such copies along with the application for review and though he has not in fact so filed them.

K. Jagannatha Iyer for Appellant.

S. Ramaswami Iyer for Respondents.

Sadasiva Aiyar and Spencer, JJ. *1917, February 26.* — L. P. A. No. 135 of 1916.

Letters Patent, Cl. 15— Appeal—Order refusing leave to appeal in forma pauperis, *not appealable.*

An order of a Single Judge of the High Court refusing leave to appeal *in forma pauperis* under S. 46 (3) of the Provincial Insolvency Act, is not appealable under Cl. 15 of the Letters Patent.

21 M. L. T. 77 referred to.

G. S. Ramachandra Iyer for Appellant.

L. A. Govindaraghava Iyer for Respondent.

Chief Justice and Srinivasa Aiyangar, J. 1917, March 20.

A. S. No. 201 of 1910.

Mortgage—Suit for sale—Appeal against decree dismissing—Execution of another mortgage in favour of third party during pendency of—Subsequent mortgagee added as party to appeal—Compromise between prior mortgagee and mortgagor subsequent to—Binding nature of compromise on subsequent mortgagee.

During the pendency of an appeal against a decree dismissing a suit for sale on a mortgage, the mortgagor executed another mortgage over the same property in favour of a third party who applied for being added and was added as a party to the appeal. Subsequent to the third party's being so added as a party the original mortgagee and the mortgagor effected a compromise and applied for its being made a rule of court. On objection taken by the subsequent mortgagee to the compromise being made a rule of court, *held* by the Chief Justice (Srinivasaiyangar, J., dissenting) that the compromise could be made a rule of court and that the subsequent mortgagee was bound by the compromise.

T. V. Venkataramaiyar, L. A. Govindaraghavaiyar and A. Viswanathaiyar for Appellant.

A. Krishnaswmi Aiyar, M. Govindarajulu Naidu, S. Subramaniaiyar for Respondents.

Ayling and Napier, JJ. 1917 March 21.

Cr. R. C. 680 of 1916.

Cr. Procedure Code, S. 344—Application for adjournment under—Order granting adjournment if can make applicant pay costs of day of opposite party—Case based on police report—Informant to police if and when can be ordered to pay day's costs.

A Court granting an adjournment under S. 344, Criminal Procedure Code can order the party at whose instance the adjournment is granted to pay to the opposite party the costs of the day. And when the case is based on a police report such an order can be passed against the informant to the police if he takes an active part in the conduct of the prosecution.

S. Panchapagesa Sastri for *K. S. Jayarama Aiyar* for Petitioner.

Public Prosecutor for Crown.

Chief Justice and Seshagiri Aiyar, J. 1917, March 22. — A. S. B. 99 of 15.

Mutt—Disciples—Right of—Representative suit by disciples—Suit for possession being given to Matathipathi—Alienation by Matathipathi—Limitation Act, S. 3, Arts. 134, 144.—C. P. Code, Or. 1, R. 8.

Two of the disciples of a mutt can for themselves and on behalf of the other disciples of the mutt maintain a suit for a declaration that an alienation by the matathipathi is not binding on the mutt and for a decree directing possession of the alienated properties to be given to the matadhipati for the time being who is made a party defendant to the suit.

Such a suit is governed either by Art. 134 or Art. 144 and not by Art. 120.

Per Seshagiri Iyer, J.—The disciples are persons claiming their right to sue for or through the matathipathi, within the meaning of the definition of "Plaintiff" in Sec. 3 of the Limitation Act.

Hon. Advocate-General T. Narasimha Aiyangar, Nallasivan Pillai, and *V. Raghavachari* for Appellants.

Hon. T. Rangachariar, A. Krishnasami Aiyar, C. Krishnamachariar and *S. Aravamudu Aiyangar,* for Respondents.

Seshagiri Aiyar, Bakewell, JJ. 1917, March 26. — C. M. A. No. 353 of 1913.

Limitation Act, Art. 182 (5)—Application in accordance with law—Mortgage decree for sale of mortgaged properties—No personal decree passed—Application in execution by decree-holder for payment to him of amounts in court, not comprised in the mortgage—Application dismissed—Will not save limitation for a subsequent application for sale.

Where a preliminary decree and order absolute for sale of mortgaged properties was passed in a mortgage suit and the decree-holder applied in execution for payment to him of amounts deposited by a receiver appointed over the properties of the judgment-debtor in another suit, and the application was dismissed on account of the non-payment of batta, the application is not one

in accordance with law, in the absence of a personal decree in the case, and will not save limitation for a subsequent execution application.

T. Rangachariar and *N. Rajagopalachariar* for the Appellant.

A. Krishnaswami Aiyar and *C. A. Seshagiri Sastri* for the Respondent.

Seshagiri Aiyar, and Bakewell, JJ. 1917, March 27. — C. M. A. No. 115 of 1915.

Civil Procedure Code, O. 34 R. 6, Ss. 38 and 42—Suit by puisne mortgagee against mortgagor and prior mortgagee—Decree by one Court for sale of mortgaged property, giving the prior mortgagee right to execute—Decree transferred for execution to another court—Application for personal decree by the prior mortgagee defendant to the Court to which the decree is transferred.

Where puisne mortgagee instituted a suit against the mortgagor and the prior mortgagee and a decree for sale of the mortgaged properties was passed and the decree gave the prior mortgagee right to execute the decree and this decree was transferred for execution to another court, an application for personal decree cannot be made to the court to which the decree had been transferred for execution; the proper court to pass a personal decree is the court which passed the original decree. 25 Mad. 244 at p. 287 dissented from.

The prior mortgagee, though a defendant can apply for a personal decree under O. 34 R. 6.

T. Rangachariar and *N. Rajagopalachariar* for the Appellant.

A. Krishnaswami Aiyar and *C. A. Seshagiri Sastri* for the Respondent.

NOTES OF RECENT CASES.

Spencer and Srinivasa Aiyangar, JJ. 1917, March 28. — L. P. A. No. 215 of 1916.

Decree—Suit to set aside—Jurisdiction—Fraudulent compromise decree of District Court—Decree for sum less than Rs. 2,500, though suit for larger amount—Suit for setting aside decree if entertainable by District Munsif's Court—Effect of Munsif setting aside decree—Trial of suit in District Court.

A District Munsif's Court has jurisdiction to entertain a suit for the setting aside on the ground of fraud of a compromise decree of a District Court if the decree was for an amount below Rs. 2,500, though the suit in which it was passed was for a larger amount and if the Munsifs' Court is otherwise competent to entertain the suit. The effect of the Munsif setting aside the compromise is to restore the parties to their original rights and on a proper application being made to the District Court, that Court must continue the trial of the suit which resulted in the compromise decree.

N. A. Krishna Aiyar for Appellant.

N. S. Rangaswami Aiyangar for *T. Narasimha Ayyangar* for Respondent.

Abdur Rahim and Srinivasaiyangar, JJ. 1917, March 29. — A. S. No. 398 of 1914.

Mortgage—Prior and subsequent mortgages—Prior mortgagee's suit without making subsequent mortgagee party and purchase by him in execution of decree therein—Subsequent mortgagee's suit against prior mortgagee for sale or for redemption—Terms of decree for redemption.

In a suit for sale or for redemption brought by a puisne mortgagee against a prior mortgagee who had sued on his mortgage without making the plaintiff a party to the suit and himself purchased the property in execution of the decree therein, *held* that the terms on which redemption should be decreed were that plaintiff should pay defendant the interest. One on his mortgage amount at the contract rate up to the date of redemption while defendant should account for the profits of the mortgaged property up to the said date.

M. D. Devadoss, T. V. Gopalaswami Mudaliar and *A. Ganesh Aiyar* for Appellant.

K. Bashyam Aiyangar and *A. Krishnaswami Aiyar* (*S. Aravamudu Aiyangar with him*) for Respondent.

Seshagiri Aiyar, and Bakewell, JJ.
1917, March 29.

S. A. No. 1862 of 1915.

Hindu Law—Joint Family—Wife of member of—Property standing in name—Presumption as to ownership of.

There is no presumption that property purchased in the name of the wife of a member of a joint Hindu family is joint family property. The onus of proving that it is, lies on the person setting up such a case.

8 M. 214, followed.

P. Somasundaram for Appellant.

B. Narasimha Rao for Respondent.

Abdur Rahim and Napier, JJ.
1917 April 3.

S. A. 1291 of 1915.

Hindu Law—Dancing girls—Succession—Principles governing—Degradation, effect of—Maternal grandmother's father's brother's daughter—Maternal grandmother's father's brother's daughter's son—Preferential heir.

Members of the dancing girl community are Hindus. The male members are governed by the Hindu Law. The law applicable to females is the ordinary Hindu Law of Succession and not the special rules governing stridhanam succession. Dancing girls are neither virgins nor married women and they never become widows so as to attract the special rules of succession applicable to the latter under the Hindu Law. Among dancing girls natural relationship is not destroyed by prostitution or degradation. In the absence of any special usage, succession among dancing women is traced as among males under the ordinary Hindu Law.

Among dancing girls as between a maternal grandmother's father's brother's daughter and a maternal grandmother's father's brother's daughter's son, the former is the preferable heir.

K. S. Ganesa Iyer for Appellant.

T. S. Ramasami Iyer for Respondent.

NOTES OF RECENT CASES.

Chief Justice and Oldfield, J. 1917, March 28. — O. S. 38 of 1916.

Registration Act, Ss. 17, 49—Agreement to lease—Registration—Necessity—Admissibility without registration in suit for specific performance or in the alternative for damages.

In a suit for specific performance of an agreement to grant a lease or in the alternative for damages, *held*, that an unregistered agreement to grant the lease was inadmissible in evidence for any purpose whatsoever.

35 M. 63 (F. B.) followed.

C. V. Anantakrishnaiyar and P. V. Ramachandra Raju for Appellant.

V. V. Srinivasaiyangar, S. Ponnuswami Aiyar, K. Narayanaswami Aiyar and *Md. Ibrahim Saheb* for Respondents.

Spencer and Srinivasa Aiyangar, JJ. 1917, March 28. — C. M. A. No. 335 of 1916.

C. P. Code, O. 21 R. 99—Application under—Dismissal as being too late—Suit under O. 21 R. 103—Limitation—Suit not barred though instituted more than a year after date of order.

Where an application under O. 21 R. 99, C. P. C. is dismissed without investigation on the ground of late presentation, *held* a suit under O. 21 R. 103 is not barred though instituted more than a year after the date of the order.

B. Somayya for Appellant.

S. Varadachariar for Respondent.

Ayling and Sadasiva Aiyar, JJ. 1917, April 3. — A. S. No. 277 of 1915.

Contract—Construction—Time of essence of contract—Test—Contract to sell immoveable property—Period fixed for completion of contract and provision for forfeiture of Vendor's rights in event of default on his part—Effect.

Where a contract to sell immoveable property fixed a period for the completion thereof and for the execution of the conveyance and provided that, in the event of default on the part of the vendee to perform his part of the contract within the period fixed, his rights in the contract should not be enforced and he should forfeit his deposit, *held*, on the construction of the contract, that there was an express stipulation making time the essence of the contract.

K. V. Krishnaswami Aiyar for Appellant.

S. Subramaniya Aiyar for Respondent.

Ayling and Sadasiva Aiyar, JJ.
1917, April 3.

C. M. A. 234 of 1913.

Civil Procedure Code, Or. 3 R. 4—Minor litigant—Vakil for—Minor attaining majority—Effect on appointment—Termination of appointment—Or. 32 R. 3 (4)—Minor defendant—Appointment of guardian for—Appointment without notice to minor—Effect.

The appointment of a pleader for a minor litigant continues in force even after the minor attains majority unless terminated under one or other of the circumstances specified in Or. 3 R. 4 of the Code.

Omission to issue notice to the minor as required by Or. 32 R. 3 (4) of the Code is a mere irregularity and does not vitiate the proceedings in which the guardian is appointed without such notice.

L. A. Govindaragavaiyar, for Appellant.

T. V. Venkatarama Aiyar, S. Varadachariar, R. Rajagopala Aiyar, for Respondent.

NOTES OF RECENT CASES.

Seshagiri Aiyar and Kumaraswami Sastri, JJ. 1917, April 4.

S. A. No. 1224 of 1916.

*Mortgage deed—Construction—Deed of usufructuary mortgage for term with personal covenant—Provision in deed for mortgage working itself out as sale in default of payment on due date and for transfer of patta to mortgagee—Validity—Clog on equity of redemption—*Bona fide *improvements by mortgagee after transfer of patta—Right to value of improvements—T. P. Act, S. 51—Execution of decree—Attachment of property in—Claim to property by person holding it adversely to judgment-debtor—Claim allowed and suit by decree-holder—*12 *years period expiring between date of claim and date of decree-holder's suit—Effect—suit if continuation of claim proceedings—claimant's right to property.*

In execution of a decree certain property was attached as belonging to the judgment-debtor but on a claim preferred by a person who had held the property adversely to the judgment-debtor, though for less than the prescriptive period, the claim was allowed and the attachment raised. Thereupon the decree-holder instituted a suit under O. 21 R. 63 for declaration that the property belonged to the judgment-debtor. The claimant resisted the suit on the ground that prior to the date of its institution his prescriptive title to the property had become perfected. *Held*, over-ruling the plea, that inasmuch as the claimant had himself invoked the assistance of the Court by preferring the claim and the suit was merely a continuation of the claim proceedings, the status quo ante continued during the pendency of both, the claimant was bound by the ultimate decision therein, and the running of the prescriptive period stopped from the date of his claim.

11 M. L. J. 344 not followed.

35 B. 79 followed.

Where a usufructuary mortgage for a term contained a personal covenant and a provision that if the mortgage amount was not paid by the due date the mortgagee was to enjoy the mortgaged property absolutely as having been purchased by himself for the said amount and that the mortgagor would present Razinama for issue of patta in the name of the mortgagee in respect of the said property, *held* that the mortgage was not an anomalous mortgage and that the provision for the mortgagee becoming absolute owner was a mere clog on the equity of redemption,

Where in the above case patta was transferred to the name of the mortgagee and subsequent to the transfer, the mortgage effected improvements on the property believing himself to be absolute owner thereof, *held* that he was entitled to the value of such improvements under S. 51 of the Transfer of Property Act.

M. D. Devadoss for Appellant.

A. Krishnaswami Aiyar for Respondent.

Abdur Rahim, J.
Napier, J.
1917, April 12.
C.M.P. No. 460, 461 and 922 of 1917.

Civil Procedure Code, O. 45, r. 15—Application for transmission of the Privy Council decree with a printed copy of the decree, but not certified—Original decree miscarried—Whether High Court can order transmission of decree on the copy—Practice—Costs—Decree of High Court directing each party to bear his costs—Pleaders not filing certificate of fees within a week of the decision—Decree of the Privy Council allowing the appeal with costs of the successful party throughout—Fees certificate in the appeal to the High Court presented with the application for transmission of decree—Whether registrar can include fees in the costs.

Where the decree of His Majesty in Council certified in the office of the Privy Council could not be produced with the application for transmission of the Privy Council decree for execution, as the same had been sent by the Solicitor in England to a wrong address and miscarried, it is competent to pass the order of transmission of the decree under O. 45 r. 15 C. P. C., on an uncertified copy of the decree printed by His Majesty's printers.

The principle of *Hurrish Chunder* v. *Kali Sundari*, 9 Cal., p. 482 followed.

Where the High Court by its decree each party to bear his own costs and consequently the pleaders failed to put in a certificate of fees within a week of the disposal of the appeal by the High Court and on appeal to the Privy Council, the appeal was allowed with the costs of the successful party throughout and he filed the fees certificate in the appeal to the High Court, after the decision of the Privy Council along with his application for transmission of the decree for execution, it is competent to the Registrar to include the fees in the costs, though the certificate was filed after 7 days of the High Court's decision.

C. A. Seshagiri Sastri for the Petitioners.

T. R. Ramachandra Aiyar and *G. S. Ramachandra Aiyar* for the Respondent.

NOTES OF RECENT CASES.

Spencer and Srinivasa Aiyangar, JJ. 1917, April 11. C. M. P. Nos. 717 and 983 of 1917.

Charity—Scheme—Appointment of fresh trustee—No provision in decree—Vacancy—Remedy by fresh suit.

Where the High Court framed a scheme for the management of a charity in the mofussil and appointed a trustee but there was no provision in the decree empowering the Court to fill up any vacancy in the office or enabling the parties to apply for directions,

Held that a vacancy in the office of trustee could not be filled up on an application by the parties but that the remedy lay in a fresh suit under S. 92, C. P. Code.

T. Narasimha Iyengar, T. Arumainatham Pillai and A. V. Visvanatha Sastri for petitioners.

K. V. Krishnaswami Iyer and S. Visvanatha Iyer for respondents.

Abdur Rahim and Srinivasaiyangar, JJ. 1917, April 12. A. S. No. 181 of 1915.

*Madras Irrigation Cess Act, S. 1—Water Cess—Imposition—Legality—Inamdar owning both banks of river and not taking more than accustomed quantity of water—Government owning one of the banks Rights of—*S. 2 (1)*—Effect—Government water mingling with Inamdar's—Effect—Engagement to supply water free of charge—Scope of—Use of water for irrigation of lands lying waste at time of settlement—Liability to levy of cess.*

An Inamdar who owns both banks of a river and does not take more than the accustomed quantity of water of the river for the irrigation of lands in excess of the mamool wet is not liable to the imposition of water cess under S. 1 of the Madras Irrigation Cess Act. He is the owner of the river.

Per Abdur Rahim, J.—Even in cases in which Government owns one of the banks, the other being owned by an Inamdar, its rights are just those of any other riparian owner.

S. 2 (1) of the Act does not declare as a rule of law the ownership of Government in all standing and flowing water nor does it shift the onus of proof of ownership on to the Inamdar. The mere fact that a small quantity of water belonging to Government mingles with water of a river belonging to an Inamdar does not entitle Government to levy water cess. To entitle Government to do so the quantity must be substantial.

Where at the time of the Inam Settlement Government undertakes to supply free of charge water used in storing up certain tanks, the engagement is not confined to the then extent of the mamool wet and the Inamdar is entitled to use the water free of charge for irrigating lands which were waste at the time of the settlement.

Hon. Advocate General (K. Balasubramaniya Iyer with him) for Appellant.

Hon. T. Rangachariar and S. Muthia Mudaliar for Respondent.

Chief Justice, Oldfield and Kumaraswami Sastri, JJ.
1917 April, 17.

Full Bench.
Cr. R. C. No. 544 of 1916.

Christian Marriage Act (XV of 1872)—Applicability—S. 68—Marriage between persons one of whom a Christian—Celebration according to Hindu mode — Hindu performing marriage if guilty of offence under S. 68.

A Hindu by religion performing a marriage according to the Hindu mode between two persons either of whom is a Christian commits an offence under S. 68 of the Christian Marriage Act.

The Act was intended to apply to marriages of all Christians including marriages in which one of the parties alone is a Christian.

"Solemnising marriage", meaning of.

Public Prosecutor for the Crown.

T. R. Ramachandra Aiyar (amicus curiæ) for Accused.

M. D. Devadoss for Complainant.

Chief Justice Abdur Rahim, Coutts Trotter, Seshagiri Aiyar and Srinivasa Aiyangar, JJ.
1917, April 23.

Full Bench.
S. A. No. 2558 of 1912.

Limitation Act, Art. 134—Applicability—Mortgage under which possession is taken by mortgagee subsequent to date thereof—Limitation in suit to recover property from him—Starting point—Date of transfer or date of possession.

Per Chief Justice and Coutts Trotter, J.:—Art. 134 applies to a transfer by way of mortgage under which possession is taken

by the mortgagee subsequent to the date thereof. In a suit to recover property from the mortgagee in such a case limitation under the article runs from the date of transfer and not from the date on which possession is taken by the mortgagee.

Per Abdur Rahim and Seshagiri Aiyar, JJ.—Art. 134 applies to such a case but limitation under the article runs from the date on which the mortgagee takes possession under his mortgage and not from the date thereof.

Per Srinivasa Aiyangar, J.—Art. 134 does not apply to such a case, but, if it does, limitation runs from the date of the mortgage and not from the date on which the mortgagee takes possession under the mortgage.

K. P. M. Menon for Appellants.

A. Sundaram for Respondent.

Wallis C. J. Oldfield and Kumarasami Sastri, JJ.
1917, April 20.

Full Bench.
S. A. No. 1693 of 1914.

Mortgage—Release of some items of mortgaged property—Right of mortgagee to proceed against the remaining items for the entire debt.

Even in a case where the mortgaged properties have been conveyed away by the mortgagor to stranger purchasers it is open to the mortgagor to release some items of the mortgaged property and to proceed against the remainder for the entire mortgage amount.

S. Panchapagesa Sastri, for *K. R. Rangaswami Iyengar* for Appellant.

K. S. Jayaram Iyer, for *T. Arumainatham Pillai* for Respondent.

Spencer and Srinivasa Iyengar, JJ.
1917, April 24.

C. M. A. No. 137 of 1916.

Provincial Insolvency Act, S. 46 (4)—Time for appeal—Time spent in obtaining copies of judgment of Court below, if can be deducted—Limitation Act, S. 12.

Their Lordships referred to the Full Bench the question whether in calculating the time prescribed for filing an appeal under S. 46 of the Provincial Insolvency Act, the appellant is entitled to deduct the time spent by him in obtaining certified copies of the judgment appealed from.

C. A. Seshagiri Sastri for Appellant.

Dr. S. Swaminathan for Respondent.

Ayling and Sadasiva Aiyar, JJ.
1917, April 25.

A S. No. 44 of 1916.

Religious Endowments Act, Ss. 14 and 18—Suit instituted by four persons with leave—Death of one pendente lite—Suit if abates.

A suit instituted under S. 14 of the Religious Endowments Act by four persons with leave under S. 18 of the Act, does not abate by the death of one of the plaintiffs during the pendency of the suit.

38 Mad. 1192; 29 M. L. J. 231, distinguished.

40 Mad. 110 referred to.

G. S. Ramachandra Iyer for Appellants.

A. Krishnasami Iyer for Respondents.

Spencer and Srinivasa Iyengar, JJ.
1917, April 25.

C. M. S. A. No. 40 to 42 of 1916.

Execution Sale—Confirmation—Agreement to set aside on payment of decree amount into court—Deposit by strangers—Sale not set aside—Decree-holder not entitled to deposit.

Certain immoveable properties were sold in execution of a decree and purchased by the decree-holder and the sale was also confirmed. Thereafter the judgment-debtor entered into a compromise with the decree-holder whereby the sale was to be set aside on payment by the former into court of the decree amount within a certain time. Certain strangers who contracted with the judgment-debtor for the private purchase of the properties on the setting aside of the sale, deposited several sums of money into court on behalf of the judgment-debtor. The sale, however, was not set aside owing to the moneys not having been deposited within time. *Held* that the deposits continued to be the property of the strangers and the decree-holder was not entitled to draw them out towards the portion of the decree left unsatisfied by the proceeds of the court sale.

13 C. W. N. 100 followed.

K. V. Krishnasami Iyer and *P. V. Parameswara Iyer* for Appellant.

M. Patanjali Sastri for Respondent.